

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1934

606

No. 6304

**SOUTHERN RAILWAY COMPANY, A CORPORA-
TION, APPELLANT,**

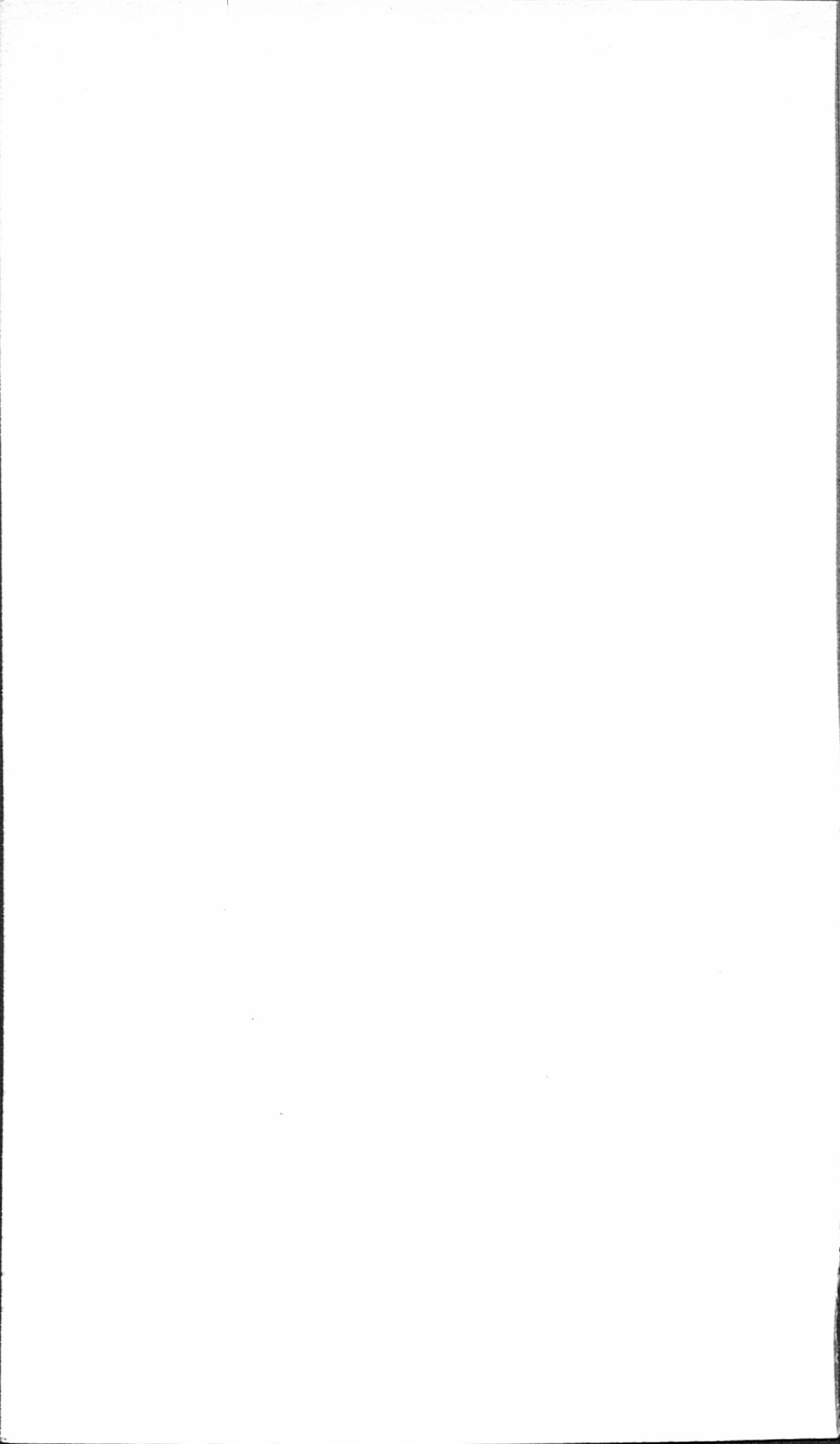
vs.

MARY E. CARTWRIGHT.

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED SEPTEMBER 12, 1934.

PRINTED NOVEMBER 7, 1934.



United States Court of Appeals for the District of Columbia

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TION, APPELLANT,

vs.

MARY E. CARTWRIGHT.

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INDEX.

	Original	Print
Caption	a	1
Amended bill of complaint	1	2
Fiat of Justice Letts	7	7
Order overruling motions to dismiss.....	8	7
Separate answer of Southern Railway Company to the amended bill of complaint	8	7
Stipulation as to transcript of testimony.....	10	9
Stipulation as to divorce proceedings	11	9
Final decree	12	10
Appeal noted by Southern Railway and bond for costs on appeal fixed, &c.	13	11
Memorandum: Bond (\$100) of defendant No. 2 on appeal approved and filed	13	11
Assignment of errors	14	11
Memoranda: Statement of evidence filed; statement of evi- dence signed and made of record	15	12
Designation of record	15	13
Clerk's Certificate	17	14
Statement of evidence	18	15
Testimony of Mrs. Sarah Cartwright.....	82	21
Testimony of Mrs. Mary E. Cartwright.....	88	25
Designation of appellant for printing record	126	44

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 12, 1934.

United States Court of Appeals for the District of Columbia

April Term, 1934.

No. 6304.

SOUTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

MARY E. CARTWRIGHT.

a Supreme Court of the District of Columbia.

Equity. No. 55895.

MARY E. CARTWRIGHT, Plaintiff,

vs.

ROBERT J. HOAGE, Deputy Commissioner for the District of
Columbia U. S. Employees Compensation Commission,
and SOUTHERN RAILWAY COMPANY, a Corporation, De-
fendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the Dis-
trict of Columbia, at the City of Washington, in said Dis-
trict, at the times hereinafter mentioned, the following
papers were filed and proceedings had, in the above-entitled
cause, to wit:

Amended Bill of Complaint.

Filed November 9, 1933.

In the Supreme Court of the District of Columbia,
Holding an Equity Court.

Equity. No. 55895.

MARY E. CARTWRIGHT, Plaintiff,

vs.

ROBERT J. HOAGE, Deputy Commissioner for the District of
Columbia U. S. Employees Compensation Commission,
and SOUTHERN RAILWAY COMPANY, a Corporation, De-
fendants.

The bill of complaint of the plaintiff, Mary E. Cartwright, respectfully represents to the Court as follows:

1. The plaintiff is a citizen of the United States, a resident of the State of Virginia, and brings this suit in her own right as the widow of Thomas J. Cartwright.

2. The defendant, Robert J. Hoage, is a citizen of the United States and a resident of the District of Columbia, and is sued as Deputy Commissioner for the District of Columbia Compensation District of the United States Employees Compensation Commission.

3. The Southern Railway Company is a corporation organized and doing business under the laws of the State of Virginia, with a place of business at 15th and K Streets, N. W., Washington, D. C., the said company being hereinafter described as "employer."

4. Said employer, in accordance with provision of an Act of Congress approved March 4th, 1927 (44 Stats. L. 1424), known as the "Longshoremen's Harbor Workers Compensation Act," which was made applicable to said employer in the District of Columbia, being Act approved May 17, 1928 (45 Stats. L. 600), had qualified as a "Self-insurer," posting bond as required, insuring payment of compensation in case of injury to or death of said employer's employees arising out of and in the course of their employment.

5. That on January 13, 1933, and for a period of 15 years theretofore, the aforementioned Thomas J. Cart-

wright had been an employee of the said employer and that while so employed on the said 13th day of January, 1933, the said Thomas J. Cartwright suddenly collapsed and fell to the floor, striking his head on a desk, and shortly thereafter was pronounced dead.

6. Thereafter, on January 26th, 1933, plaintiff filed formal claim for compensation with the said defendant, Robert J. Hoage, Deputy Commissioner, and the copy of said claim attached to the original Bill of Complaint and marked "Plaintiff's Exhibit A," is prayed to be taken and read as a part hereof.

7. Thereafter, the defendant, Robert J. Hoage, Deputy Commissioner, ordered a hearing on said claim on May 17th, 1933, at which hearing it was admitted on behalf of said employer that the employee was subject to the provision of the said Compensation Act at the date of the death of said Thomas J. Cartwright on January 13, 1933; that the relationship of employer and employee existed at that time between the said Southern Railway Company and the said Thomas J. Cartwright and that the said Thomas J. Cartwright was rendering service for the employer at that time; that the said employer had knowledge of the injury; that the wages of the said Thomas J. Cartwright were \$129.60 per month, with a six day working week; that the

3 marriage of the plaintiff to the said Thomas J. Cartwright on March 24, 1902, was valid; it was denied on behalf of the said employer that the said Thomas J. Cartwright sustained an injury resulting in his death within the meaning of the Act, and it was also denied that the claimant was the surviving wife or widow of the said Thomas J. Cartwright within the meaning of the said Compensation Act. Thereupon testimony was taken and the said defendant, Robert J. Hoage, Deputy Commissioner, filed a compensation order containing the findings of fact on the 9th day of June, 1933:

"That on the thirteenth day of January, 1933, Thomas J. Cartwright, hereinafter known as 'Employee,' was in the employ of the employer above named, whose address is 15th and K Streets, N. W., Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled 'An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the

District of Columbia and for other purposes'; that the liability of the employer for compensation under said Act was secured by the employer's qualifying as self-insurer; that on said day the employee above named suddenly collapsed and fell, while standing at a file index case, and in falling he struck his head on a desk, and as a result thereof he suffered a fracture of the skull; that said injury arose out of and in the course of his employment, and resulted in his death on the same date; that Mary E. Cartwright, claimant herein, made claim for compensation on account of the death of the employee, and that her right to compensate was controverted by the employer herein on the ground that she was not the surviving wife of the employee within the meaning of the Act. It is found that the claimant, Mary E. Cartwright, was not living with the employee, neither was she dependent upon him for support at the time of his death; that the claimant failed to establish by evidence that she was living apart for justifiable cause or by reason of his desertion.

4 "Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for compensation be, and it hereby is rejected for the following reason:

"That the claimant failed to establish by evidence that she was living apart from the employee for justifiable cause or by reason of his desertion."

8. That at the hearing before the said Robert J. Hoage, Deputy Commissioner, plaintiff, Mary E. Cartwright, called as a witness in her own behalf, testified in substance as follows: that she was married to the said Thomas J. Cartwright on the 24th day of March, 1902, and lived continuously with him until September 13, 1930, when it became necessary for her to take one of her children, who had become ill, to Arizona, where she remained until September, 1931; that when she returned she found that her husband's attitude toward her was entirely changed, that he refused to speak to her, allow her to do any cooking, or to allow her any privileges of the household whatsoever, and when she requested an explanation he replied that if she did not like the way he was doing she could leave and stay away; that she was dependent upon him for support, and that because of his attitude toward and treatment of her she was forced to leave and make her living the best way she could; that she made a tender of reconciliation but

that he remained adamant and refused to change his attitude toward her; all of which is shown by the transcript of the record of the hearing before the said defendant, Robert J. Hoage, Deputy Commissioner, which is prayed to be taken and considered as a part hereof.

5 9. That the only evidence offered by the employer to rebut the testimony of the claimant as set forth in the preceding paragraph was a bill for divorce filed by the said Thomas J. Cartwright and a cross-bill filed by the said claimant, pending at the time of the said hearing, which was admitted in evidence by the said Robert J. Hoage, Deputy Commissioner, the purpose of which at the time of the admission thereof not being disclosed. Thereafter, however, counsel for the defendant, Southern Railway Company, announced at the said hearing that he was resting his "whole evidence upon this bill of complaint and the answer." That no evidence was introduced by the said defendant, Southern Railway Company, of a substantial nature, as required by Section 20 of the said Compensation Act, to overcome the prima facie showing of the said claimant.

10. Plaintiff avers that the said bill for divorce was not competent evidence of the truth of any statement contained therein and had no probative value whatsoever, and that it was not proper for the defendant, Robert J. Hoage, Deputy Commissioner, to consider it as evidence against the claimant tending to show that she was not living apart from her husband for justifiable cause, or that she was not dependent upon him for support at the time of his death.

11. The plaintiff avers that the finding of the defendant, Robert J. Hoage, Deputy Commissioner, that the claimant was not living apart from her husband for justifiable cause and that she was not dependent upon him for support at the time of his death was without substantial evidence whatsoever to support the same.

Wherefore, in consideration of the premises, plaintiff prays:

6 1. That a writ of subpoena be issued by this Court against defendants, Robert J. Hoage, Deputy Commissioner, and Southern Railway Company, a corporation, requiring them, by a day certain, to be therein

named, to appear herein and answer the exigencies of this Bill of Complaint.

2. That this Honorable Court pass an order setting aside so much of the compensation order, rejection of claim, filed by the said defendant, Robert J. Hoage, Deputy Commissioner, on the 9th day of June, 1933, as aforesaid, as refers to the finding of fact that the claimant failed to establish by evidence that she was living apart from the employee for justifiable cause or by reason of his desertion, or that she was not dependent upon him for support at the time of his death.

3. That a mandatory injunction issue requiring the defendant, Robert J. Hoage, Deputy Commissioner, to enter a compensation order, awarding the plaintiff herein the compensation due her under and by virtue of the provisions of the Act aforesaid, and in this connection to remand this cause, if necessary, for further hearing.

4. That the said defendant, Robert J. Hoage, Deputy Commissioner, be required to produce to this Court a transcript of the record of the hearing had before him in this case, including the said bill for divorce and answer thereto and all other exhibits.

5. That the plaintiff may have such further and other relief as the nature of the case may require and to the Court may seem proper.

MARY E. CARTWRIGHT,
Plaintiff.

HENRY STEARMAN,
Attorney for Plaintiff.

7 DISTRICT OF COLUMBIA, ss:

I, Mary E. Cartwright, plaintiff in the above-entitled cause of action, on oath depose and say that I have read the foregoing Bill for Injunction by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true and those stated upon information and belief, I believe to be true.

MARY E. CARTWRIGHT.

Subscribed and sworn to before me this 9th day of Nov., 1933.

(NOTARIAL SEAL.)

LOUIS HOROWITZ,
Notary Public, D. C.

Right to require motion for leave to file amended bill is hereby waived.

HAMILTON & HAMILTON,
By HENRY R. GOWER,
J. J. WILSON,
Asst. U. S. Att'y D. C.

Fiat of Justice Letts.

Leave to file Amended Bill of Complaint is hereby granted.

F. D. LETTS,
Justice.

8 *Order Overruling Motions to Dismiss.*

Filed February 9, 1934.

* * * * *

This cause coming on to be heard upon the motions of the defendants to dismiss the amended bill of complaint filed herein, and the same having been argued and considered, it is, by the Court, this 9th day of February, 1934, adjudged, ordered and decreed that the said motions be and the same are hereby overruled.

DANIEL W. O'DONOGHUE,
Justice.

Separate Answer of the Defendant, Southern Railway Company, to the Amended Bill of Complaint.

Filed February 13, 1934.

* * * * *

1. This defendant admits the citizenship and residence of the plaintiff, and that she was the wife of Thomas J. Cartwright, deceased, but denies that plaintiff is the "widow" of the said Cartwright, within the definition of that term in the District of Columbia Workmen's Compensation Act.

2. The allegations of the second paragraph are admitted.

3. The allegations of the third paragraph are admitted.

4. The defendant admits the allegations of the fourth paragraph of the Amended Bill, but states that the same are entirely irrelevant and immaterial and are mere surplusage in view of the Findings of Fact of the Deputy Commissioner set up in the Amended Bill.

5. The defendant admits the allegations of paragraph five, except that defendant denies on information and belief that said Cartwright struck his head on a desk.

9 6. The defendant admits the allegations of paragraph six but says that the paragraph is irrelevant and immaterial.

7. The defendant admits the allegations of paragraph seven.

8. The defendant denies that the plaintiff, Mary E. Cartwright, testified in substance as set out in paragraph eight.

9. Answering paragraph nine, the defendant admits that no witness was offered by it on the matter of plaintiff's living apart from her husband. Defendant denies that its counsel made the announcement stated in paragraph nine, but says that in answer to an inquiry by the Deputy Commissioner, counsel said that as to the proof to be introduced, the defendant was confined to the bill, for the purposes of the hearing.

10. The defendant denies the allegations of paragraph ten and says that the matter therein is a conclusion of law.

11. The defendant denies the allegations of paragraph eleven.

And having fully answered, this defendant prays to be hence dismissed, with its reasonable costs.

SOUTHERN RAILWAY COMPANY,
By JOHN B. HYDE,
Vice-President.

I, John B. Hyde, do solemnly swear that I have read the foregoing answer by me subscribed as a Vice-President of the Southern Railway Company, and know the contents thereof; that the matters and things therein set forth on personal knowledge are true, and those stated on information and belief, I believe to be true.

JOHN B. HYDE.

10 Subscribed and sworn to before me this 12th day of February, A. D. 1934.

(NOTARIAL SEAL)

P. K. HOWARD,
Notary Public, D. C.

HAMILTON & HAMILTON,
HENRY R. GOWER,
Attorneys for Southern Railway Company.

Stipulation.

Filed March 12, 1934.

* * * * *

The plaintiff and defendants in the above-entitled action stipulate and agree that the transcript of testimony taken before Robert J. Hoage, Deputy Commissioner, U. S. Employees' Compensation Commission, on May 17, 1933, in the case of Mary E. Cartwright vs. Southern Railway Company, self-insurer, heretofore filed herein, including the separate papers in evidence, divorce bill, cross-bill and letter of January 12, 1933, be considered as exhibits to and read as a part of the amended bill of complaint filed herein.

LESLIE C. GARNETT,

U. S. Attorney,

JOHN J. WILSON,

*Assistant U. S. Attorney,**Attorneys for Robert J. Hoage.*

HAMILTON & HAMILTON,

By HENRY R. GOWER,

Attorneys for Southern Railway Company.

HENRY STEARMAN,

Attorney for Mary E. Cartwright.

11

Stipulation.

Filed May 18, 1934.

* * * * *

The plaintiff and defendants in the above-entitled action, having heretofore stipulated and agreed that the transcript of the testimony taken before Robert J. Hoage, Deputy Commissioner for the District of Columbia, U. S. Employees' Compensation Commission, on May 17, 1933, in the case of Mary E. Cartwright vs. Southern Railway Company, self-insurer, filed herein, including the separate papers in evidence, divorce bill, cross-bill and letter of January 12, 1933, be considered as exhibits to and read as a part of the amended bill of complaint, it is hereby further stipulated and agreed by and between the said parties that

the said transcript of record is a true and accurate report of the proceedings had before the said Deputy Commissioner and that the said transcript of record, including the said separate papers in evidence, be received in evidence at the final hearing herein.

LESLIE G. GARNETT,

U. S. Attorney,

JOHN J. WILSON,

Assistant U. S. Attorney,

Attorneys for Robert J. Hoage.

HAMILTON & HAMILTON,

By HENRY R. GOWER,

Att'ys for Southern Railway Co.

HENRY STEARMAN,

Att'y for Mary E. Cartwright.

12

Final Decree

Filed May 21, 1934.

* * * * *

This cause, coming on to be heard upon the amended bill of complaint and the answer filed thereto by the defendant, Southern Railway Company, and the motion to dismiss of Robert J. Hoage, Deputy Commissioner, and upon consideration of the same and the exhibits admitted in evidence, it is, by the Court, this 21st day of May, 1934,

Adjudged, ordered and decreed that said motion to dismiss is overruled and that the said defendant, Robert J. Hoage, Deputy Commissioner, be, and he hereby is, permanently enjoined from giving any effect whatever to the compensation order entered by him on June 9, 1933, in the case of Mary E. Cartwright, plaintiff, vs. Southern Railway Company, employer and self-insurer, and it is further

Adjudged, ordered and decreed that so much of the order, entered by the said Robert J. Hoage, Deputy Commissioner, on the said 9th day of June, 1933, and complained of in the amended bill of complaint, as reads as follows:

“It is found that the claimant, Mary E. Cartwright, was not living with the employee, neither was she dependent upon him for support at the time of his death; that the claimant failed to establish by evidence that she was living apart for justifiable cause or by reason of his desertion.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for compensation be, and it hereby is rejected for the following reason: That the claimant failed to establish by evidence that she was living apart from the employee for justifiable cause or by reason of his desertion."

be, and the same is hereby set aside, as being not in accordance with law; and it is further

Adjudged, ordered and decreed that the said defendant, Robert J. Hoage, Deputy Commissioner, be, and he hereby is, ordered and directed to enter and file in the
13 case before him entitled Mary E. Cartwright, plaintiff, vs. Southern Railway Company, employer and self-insurer, a compensation order, awarding compensation to Mary E. Cartwright, who is the widow of Thomas J. Cartwright, in accordance with Section 2 (16), and other sections pertaining to this cause, of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927, as made applicable to the District of Columbia by the Act approved May 17, 1928; and it is further

Adjudged, ordered and decreed that the matter of fee for the attorney for plaintiff be reserved for adjudication later.

By the Court:

DANIEL W. O'DONOGHUE,
Justice.

From the above decree, the defendant, Southern Railway Company, hereby, in open court, notes an appeal to the Court of Appeals, and the bond for costs on appeal is hereby fixed at \$100.00 or \$50 cash in lieu of bond.

DANIEL W. O'DONOGHUE,
Justice.

Memorandum.

June 1, 1934. Bond (\$100) of defendant No. 2 on appeal approved and filed.

14 *Assignment of Errors.*

Filed June 4, 1934.

* * * * *

The Court erred:

1. In enjoining the defendant, Robert J. Hoage, Deputy Commissioner, from giving effect to the Compensation Or-

der of June 9, 1933, insofar as said order is in form a rejection of claim.

2. In setting aside so much of the Compensation Order of June 9, 1933, as follows:

“It is found that the claimant, Mary E. Cartwright, was not living with employee, neither was she dependent upon him for support at the time of his death; that the claimant failed to establish by evidence that she was living apart for justifiable cause or by reason of his desertion.

“Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for compensation be, and it hereby is rejected for the following reason:

“That the claimant failed to establish by evidence that she was living apart from the employee for justifiable cause or by reason of his desertion.”

3. In holding in the decree signed herein on May 21, 1934, that the above-quoted portion of the Compensation Order of June 9, 1933, was not in accordance with law.

4. In directing in the decree of May 21, 1933, the Deputy Commissioner, Robert J. Hoage, to enter and file in the case before him a Compensation Order awarding compensation to the plaintiff, Mary E. Cartwright.

5. In stating in the decree of May 21, 1934, that plaintiff, Mary E. Cartwright, is the widow of Thomas Jessup Cartwright, deceased.

6. In passing and signing the decree herein of May 21, 1934.

15 7. In granting the relief prayed for in the Amended Bill of Complaint herein.

8. In other respects apparent of record.

HAMILTON & HAMILTON,
By HENRY R. GOWER,
Attorneys for Defendant,
Southern Railway Co.

Memoranda.

June 4, 1934. Statement of Evidence filed.

July 10, 1934. Statement of Evidence signed and made of record.

Designation of Record.

Filed June 4, 1934

* * * * *

Now comes the Southern Railway Company, appellant in the above-entitled cause, and designates the parts of the record which it desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Amended Bill of Complaint, filed November 9, 1933, (Transcript of Record of hearing before Honorable Robert J. Hoage, Deputy Commissioner, not to be written as part of the Amended Bill of Complaint for the reason that the said transcript is set out in the Statement of Evidence filed herein.)

2. Order overruling motions to dismiss Amended Bill, February 9, 1933.

16 3. Separate answer of the defendant, Southern Railway Company, to the Amended Bill of Complaint.

4. Stipulation of counsel filed March 12, 1934, providing that transcript of testimony before the Deputy Commissioner, including the separate papers, divorce bill, cross bill and letter of January 12, 1933, be considered as exhibits to and read as a part of the Amended Bill of Complaint filed herein, and letter of January 12, 1933, be considered as exhibit to and read as part of the Amended Bill of Complaint filed herein.

5. Stipulation of counsel filed May 18, 1934, that the transcript of testimony by the Deputy Commissioner is a true and accurate report of the proceedings had before the Deputy Commissioner and that the said transcript of record including the separate papers in evidence be received in evidence in the final hearing herein.

6. (a) Certified copy of Bill in Chancery for Divorce in the Circuit Court of Fairfax County, Virginia, by Thomas Jessup Cartwright v. Mary E. Cartwright.

(b) Certified copy of answer and cross bill of complaint of Mary E. Cartwright in suit of Thomas Jessup Cartwright v. Mary E. Cartwright in the Circuit Court of Fairfax County, Virginia.

(c) Copy of letter, dated January 12, 1933, by F. S. McCandlish, Attorney at Law, Fairfax Court-House, Virginia, to Thomas Jessup Cartwright.

7. Final decree of May 21, 1934.

8. Statement of Evidence.

9. Designation of Record.

HAMILTON & HAMILTON,
By HENRY R. GOWER,
*Attorneys for Appellant,
Southern Railway Company.*

17 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 16, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 55895 in Equity, wherein Mary E. Cartwright is plaintiff and Robert J. Hoage, Deputy Commissioner for the District of Columbia U. S. Employees Compensation Commission, et al., are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of September, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.
By CHAS. D. COFLIN,
Assistant Clerk.

18 In the Supreme Court of the District of Columbia,
Holding an Equity Court.

Bill for Injunction #55895.

MARY E. CARTWRIGHT, Plaintiff,

v.

ROBERT J. HOAGE, Deputy Commissioner for the District of Columbia U. S. Employees' Compensation Commission, and SOUTHERN RAILWAY COMPANY, a Corporation, Defendants.

Statement of Evidence.

At the hearing of the above-entitled cause on May 21, 1934, before Mr. Justice O'Donoghue, the following proceedings were had and evidence offered and given.

The following evidence was offered and considered by the Court:

The Transcript of Testimony at hearing before Honorable R. J. Hoage, Deputy Commissioner for the District of Columbia, on May 17, 1933, pages 1 to 91 inclusive, the said transcript including by reference on page 65 thereof a Bill in Chancery for Divorce by Thomas Jessup Cartwright v. Mary E. Cartwright, in the Circuit Court of Fairfax County, Virginia, and Answer of Mary E. Cartwright (designated as Cross Bill), which papers were marked "Respondent's Exhibit No. 3," and the said transcript also included by reference on page 79 thereof a letter, dated January 12, 1933, from F. S. McCandlish to Thomas Jessup Cartwright, which was marked "Respondent's Exhibit No. 4." The said transcript is as follows:

19 United States Employees' Compensation Commission, Washington, D. C.

Case No. 37-6.

MARY E. CARTWRIGHT, Claimant,

vs.

THE SOUTHERN RAILWAY COMPANY, Employer.

Insurance Carrier; Self-insurer.

Transcript of Testimony at Hearing Before Honorable R. J. Hoage, Deputy Commissioner for the District of Columbia, May 17, 1933.

Prepared for Messrs. Hamilton & Hamilton, Union Trust Building, Washington, D. C. H. S. Middlemiss, Shorthand

Reporter, Columbian Building, Washington, D. C. Telephone National 2369.

Index.

	Direct	Cross	Redirect	Recross
Dr. A. Magruder MacDonald.....	22	..	..	..
Warren S. Runker.....	26	..	..	..
Haywood C. Johnson.....	26	..	..	..
Dr. W. I. Robey.....	27	..	..	..
Dr. J. E. Payne.....	{ 31	33	..	..
	{ 37	..	..	39
R. E. Weedon.....	44	48	54	..
Dr. Stanley J. Gordon.....	55	57	..	..
Mrs. Sarah Cartwright.....	61	..	..	..
Mrs. Mary E. Cartwright.....	68	..	..	..
David P. Linthicum.....	83	88	..	..

21 United States Employees' Compensation Commission for the District of Columbia.

Before Hon. R. J. Hoage, Deputy Commissioner for the District of Columbia.

No. 37-6.

MARY E. CARTWRIGHT, Claimant,

vs.

THE SOUTHERN RAILWAY COMPANY, Employer and Self-Insurer.

Transcript of Testimony at Hearing.

* * * * *

Pursuant to notice, this matter was heard before Honorable R. J. Hoage, Deputy Commissioner, United States Employees' Compensation Commission, at Washington, D. C., on May 17, 1933, at 2 o'clock p. m.

Appearances:

John Foster Hagan, Esquire, on behalf of the Claimant:

Henry R. Gower, Esquire, on behalf of the Respondent.

22 The Deputy Commissioner: This is the case of Mary E. Cartwright, the claimant, against the Southern Railway Company, the employer and self-insurer, having been formally set for hearing.

Parties present:

Is Mrs. Mary E. Cartwright here?

Mr. Hagan: Yes, sir.

The Deputy Commissioner: Represented by Attorney John Foster Hagan.

Mr. Hagan: Yes, sir.

The Deputy Commissioner: Witnesses in behalf of the claimant, Dr. A. Magruder MacDonald.

Dr. Murphy: He will be here.

The Deputy Commissioner: Dr. Murphy is here, Officer Warren S. Runker, Officer Haywood C. Johnson, R. E. Weedon, David F. Linthicum. Any other witnesses, Mr. Hagen?

Mr. Hagen: Dr. J. E. Payne.

The Deputy Commissioner: Dr. J. E. Payne. Is he here?

Mr. Hagan: Yes, sir; he is present, sir.

The Deputy Commissioner: Representing the respondent, Attorney Henry R. Gower.

Witnesses in behalf of the respondent:

Mr. Linthicum is here, twice, apparently. Mrs.
23 Sarah Cartwright.

Mr. Gower: Yes, sir; she is here.

The Deputy Commissioner: Dr. Stanley J. Gordon.

Mr. Gower: Dr. Gordon has not arrived. I 'phoned him this morning. He is a very material witness and he said he would be here.

The Deputy Commissioner: Claim having been filed on the 26th day of January, 1933, by Mrs. Mary E. Cartwright, alleging to be the surviving wife of the deceased employee, Thomas Jessup Cartwright, arising by reason of an alleged injury occurring to Mr. Cartwright on the 13th day of January, 1933, while in the employ of the Southern Railway Company as a clerk; that the employee was 53 years of age; and he is alleged to have been receiving wages in the amount of \$129.60 per month, working six days per week; that he died immediately; that the time of the injury was

on January 13, 1933; and that, by reason of the death of the employee, the claimant, Mary E. Cartwright, makes claim for compensation in her own behalf, as the widow of the deceased employee, alleging to have been married to the deceased employee on March 24, 1902.

Mr. Gower, you are representing the respondent in this case, are you not?

Mr. Gower: Yes, your Honor.

24 The Deputy Commissioner: Will you admit that the Southern Railway Company, as a corporation, was subject to the provisions of the District of Columbia Workmen's Compensation Act at the time of this injury?

Mr. Gower: Yes, sir.

The Deputy Commissioner: Will you admit that Thomas Jessup Cartwright was in the employ of and rendering service for the employer on that date?

Mr. Gower: Yes, your Honor.

The Deputy Commissioner: Will you admit that the Southern Railway Company had knowledge of the injury within 30 days?

Mr. Gower: Yes, your Honor.

The Deputy Commissioner: Will you admit that the wages of the employee was \$129.60, working six days per week?

Mr. Gower: Yes, sir.

The Deputy Commissioner: Will you admit that the employee collapsed and fell and suffered an injury described as fracture of the skull on that date?

Mr. Gower: Yes, with an avoidance of the use of the word "injury" in that it might mean an admission.

The Deputy Commissioner: I was only asking if you admitted that he collapsed and fell and suffered a fracture of the skull on that date.

Mr. Gower: Yes, your Honor.

The Deputy Commissioner: Then I was going to ask you for your denial.

Mr. Gower: Yes, your Honor.

25 The Deputy Commissioner: Then you might tell us what your objection is to the payment of compensation in the case.

Mr. Gower: Our objection to the payment of compensation is that it is denied that the case is within the scope of the District of Columbia Workmen's Compensation Act.

The Deputy Commissioner: You mean that you are denying that?

Mr. Gower: We deny that he sustained the injury within the meaning of the Act.

The Deputy Commissioner: Of Section 2 of the Act?

Mr. Gower: Yes.

The Deputy Commissioner: All right.

Mr. Gower: And the second ground of denial of the claim is that the claimant is not the widow of the decedent under the Act; and the third ground will depend on the showing made. I think there is really no claim made in respect of the two children.

The Deputy Commissioner: No. They are both over 18 years of age; and there is only one claim filed and that is in behalf of the surviving widow.

Mr. Gower: Yes. Those are our grounds.

The Deputy Commissioner: Then the questions to be proven in this case are that the employee sustained the injury within the meaning of the District of Columbia Workmen's Compensation Act; and that the claimant is the surviving widow within the meaning of the Act, as well.

Mr. Gower: Exactly, Mr. Commissioner.

The Deputy Commissioner: Who was the attending physician of this employee at the time he was injured?

Mr. Gower: Dr. Gordon.

Mr. Hagen: Dr. Gordon.

The Deputy Commissioner: Dr. Gordon. He is to be here later.

Mr. Gower: He is under subpoena. I 'phoned him this morning and he said he would be here.

The Deputy Commissioner: That is all right. We will hear him when he comes. I find in the record of the Deputy Commissioner a copy of the certificate of marriage, which took place at Rockville, Maryland, on the 24th day of March, 1902.

Mr. Gower: We have no question as to that.

The Deputy Commissioner: I would like to know what the basis of your denial is, if it is any more than a legal record to be established.

Mr. Gower: No, your Honor, that marriage is admitted. We have a certified copy of the complaint in divorce filed in the Circuit Court of Fairfax County, Virginia, and of the answer and cross bill.

The Deputy Commissioner: What was the basis
27 for that suit for divorce?

Mr. Gower: Desertion.

The Deputy Commissioner: Desertion by the claimant?

Mr. Gower: Desertion by the claimant in this proceeding of the complainant in the divorce suit, Mr. Cartwright, who was the deceased. Mr. Cartwright filed a proceeding against Mrs. Cartwright, claiming that Mrs. Cartwright was guilty of desertion.

The Deputy Commissioner: How long prior to his death?

Mr. Gower: Well, probably, from September—well, from about May, 1932. There is one desertion alleged to have occurred in 1931.

The Deputy Commissioner: Was she living with him and depending upon him for support at the time of his death?

Mr. Gower: No, not living with him. That is conceded.

The Deputy Commissioner: She was living apart from him at the time of death?

Mr. Gower: That is conceded, I think.

The Deputy Commissioner: That is true?

Mr. Gower: Yes.

The Deputy Commissioner: And the bill for divorce is by the deceased on the ground of her desertion?

Mr. Gower: That is right.

The Deputy Commissioner: And what is the cause? Is it a justifiable cause?

28-80 Mr. Gower: Well, we——

The Deputy Commissioner (interposing): Are you going to attempt to prove that she had a justifiable cause?

Mr. Hagan: Yes.

The Deputy Commissioner: I think we will reserve the testimony on that. While the physicians are here I would like to get their testimony first, and we will take up the question whether the death of the employee was due to an injury within the meaning of the Act.

81 Mr. Hagan: I will call Mrs. Cartwright, the claimant.

The Deputy Commissioner: You have made claim, have you not, that the claimant is the surviving wife of the deceased employee?

Mr. Hagan: Yes, sir.

The Deputy Commissioner: And you have furnished proof indicating that she was properly married to the deceased?

Mr. Hagan: Yes, sir.

Mr. Gower: May I ask—your Honor is not foreclosing me?

The Deputy Commissioner: No, sir. I will allow you to go ahead, and then, if there is nothing established to the contrary——

82 (Discussion off the record ensued.)

The Deputy Commissioner: You want Mrs. Sarah Cartwright?

Mr. Gower: Yes, your Honor.

Thereupon **Mrs. Sarah Cartwright** was called as a witness for and on behalf of the respondent, and having been previously duly sworn by the Deputy Commissioner, as above indicated, assumed the witness stand, and, upon examination, testified as follows:

The Deputy Commissioner: Just give your full name and address, Mrs. Cartwright.

The Witness: All of my name?

The Deputy Commissioner: Yes.

The Witness: Sarah A. Brooke Cartwright, Brighton Hotel, Apartment 515.

The Deputy Commissioner: In Washington?

The Witness: Yes.

Direct examination.

By Mr. Gower:

Q. Mrs. Cartwright, I hand you a letter there, and ask whether you have ever seen it before, whether you can identify it, that is, saying what it is, more than whether you know it or not, whether you know what it is, whether you have seen it before? A. Yes.

83 Q. Mrs. Cartwright, where did you get this letter, please? You have seen this letter before? It has been in your possession? A. I think I had it at home.

Q. Where did you get it? A. I got it, I think—if I am telling you right, I think it w-s in a letter in his pocket, that he got the morning that he died.

The Deputy Commissioner: Is this the mother of Thomas J. Cartwright?

Mr. Gower: This is Thomas J. Cartwright's aunt, who later married his father.

The Witness: He is my—he was my oldest sister's child. She died and left him to me. After a while I married his father and his mother was my sister and his father was my husband, which makes him my child.

By Mr. Gower:

Q. Now, in his pocket—the pocket of what garment, Mrs. Cartwright? A. It was his overcoat.

Q. I see. And when did you find this letter in his overcoat pocket? A. Perhaps it was—now, let me see. I got home the evening that he died. It was either that evening or next morning.

84 Q. That was Friday evening or Saturday morning? A. Yes.

Q. It was in his overcoat pocket? A. Yes.

Q. How did you get possession of his overcoat, in which the letter was? A. His overcoat and other—(a pause).

Q. Property? A. His clothes were brought to me by some of the gentlemen of the Southern Railway.

Mr. Gower: I see. Now I offer this letter. I connect it up by calling attention to the date of the letter and the date of Mr. Cartwright's death. I do not think that it has got very great importance, but it is—I can state the purpose for which its admission is sought, if your Honor thinks that is necessary.

(The letter was handed to the Deputy Commissioner.)

The Deputy Commissioner: I do not know the purpose of it yet.

Mr. Hagan: I object to it, on the ground that it is not properly identified and it is irrelevant.

The Deputy Commissioner: I want to find out just what the relevancy of it is.

Mr. Gower: I do not think it has great relevancy.

The Deputy Commissioner: What is the purpose of introducing it?

85 Mr. Gower: To show the letter that Mr. Cartwright was reading at the time that he was stricken with this stroke of apoplexy.

The Deputy Commissioner: What effect does it have upon the evidence in this case?

Mr. Gower: Not a great deal, not a great deal. It is simply one of the pieces of evidence we have had, and it may show some emotional cause for the stroke. I do not insist on it.

The Deputy Commissioner: Has that anything to do with the relationship of the surviving wife?

Mr. Gower: Not at all, because there is other evidence on that; and I withdraw the submission of that.

(The witness was thereupon excused and retired from the witness stand.)

The Deputy Commissioner: Now, the claim is denied on the ground that the claimant is not the surviving wife of the deceased employee. What evidence have you to present on that question?

Mr. Gower: Now, you are expecting evidence from us on that?

The Deputy Commissioner: I am expecting rebuttal evidence. The claim is here and there is testimony that she is the surviving wife.

Mr. Gower: I offer in evidence a certified copy of
86 the petition for divorce filed in the Circuit Court
of Fairfax County and certified copy of the answer
and cross bill.

The Deputy Commissioner: Has it been passed upon by the Court? Has the divorce been granted?

Mr. Gower: I understand that it was pending at the time of his death.

The Deputy Commissioner: This is really a complaint filed by the deceased and the cross bill filed by the claimant?

Mr. Gower: Yes.

The Deputy Commissioner: Does it state the grounds for divorce?

Mr. Gower: Yes; desertion.

The Deputy Commissioner: Then the cross bill was filed by the claimant as an answer to this?

Mr. Gower: Yes, your Honor.

The Deputy Commissioner: Is that all the rebuttal evidence you have?

Mr. Gower: Yes. There may be sur-rebuttal, but that is our prima facie evidence.

The Deputy Commissioner: It will be marked as Respondent's Exhibit No. 3.

(The documents hereinabove referred to were thereupon received in evidence and are filed in the office of the Deputy Commissioner with the original papers in this case, marked Respondent's Exhibit No. 3.)

87 Mr. Hagan: I object to it, on the ground that neither the bill of complaint itself nor the answer is sworn to, but they are merely paper writings purporting to be a bill of complaint and an answer.

The Deputy Commissioner: Who certified to it, Mr. Gower?

Mr. Gower: The Judge of the Court.

The Deputy Commissioner: It is a court of record, is it not?

Mr. Gower: Yes. If it is certified it is admissible. If it was not signed or sworn to, that is a matter for the Circuit Court of Fairfax County.

Mr. Hagan: I withdraw the objection, then.

The Deputy Commissioner: Do you know what is contained in it?

Mr. Hagan: Yes, sir. I know what is contained in it.

The Deputy Commissioner: Does that complete your rebuttal evidence?

Mr. Gower: Yes, sir.

The Deputy Commissioner: Now, what have you to offer in rebuttal of that bill of complaint?

Mr. Hagan: The ground set forth in this complaint, sir, is that of desertion. The cross bill charges that the respondent in that case, the claimant here, was forced to leave and did leave for justifiable cause, and that she made

88 tender of reconciliation.

The Deputy Commissioner: Made what?

Mr. Hagan: Made tender of reconciliation.

The Deputy Commissioner: How soon after this bill was filed?

Mr. Hagan: The following month.

The Deputy Commissioner: Before any action of the Court?

Mr. Hagan: Before any action of the Court. The Court had never passed upon this. The case was pending at the time of Mr. Cartwright's death.

The Deputy Commissioner: What evidence have you to show that she tendered some offer of reconciliation?

Mr. Hagan: Her own testimony and the tender of reconciliation is in the cross bill itself.

The Deputy Commissioner: I am going to ask you to put on all the testimony of the claimant and, since you have the papers in the case, to file a brief and send a copy to Mr. Gower as well as to this office.

Mr. Hagan: Yes, sir. Thank you.

The Deputy Commissioner: All right. You may put on your testimony.

Thereupon **Mrs. Mary E. Cartwright**, the claimant, was called as a witness for and on behalf of the claimant, and, having been previously duly sworn by the Deputy
89 Commissioner, as above indicated, assumed the witness stand, and, upon examination, testified as follows:

The Deputy Commissioner: May I ask her one or two questions?

Mr. Hagan: Surely, sir.

Direct examination.

By the Deputy Commissioner:

Q. You are Mrs. Mary E. Cartwright, are you? A. Yes, sir.

Q. And you are claiming to be the surviving widow of the deceased employee? A. Yes.

Q. And, as I understand it, this is your certificate of marriage (exhibiting document)? A. Yes, sir.

Q. You were married on the 24th day of March, 1902, at Rockville, Maryland? A. Yes, sir.

Q. And when did you leave him? A. I left in February the first time. I went away in order to try to get——

Q. (Interposing.) In February of what year? A. In '32.

Q. 1932, in February, you left him first? A. Yes.

90 Q. All right. When did you leave him again? A.

Well, I was called back. My daughter was sick and they called me in the night, about eleven o'clock, and I went back.

Q. You went back when? A. In April. I do not just know the date.

Q. April, 1932? A. Yes, sir.

Q. How long did you stay there that time? A. I stayed there six weeks, until Dr. Robey said it was all right for me to leave my daughter.

Q. And then you left again when? A. I left in May, about the last of May.

Q. You left in May, 1932? A. Yes, sir.

Q. Did you take your belongings with you when you first left? A. I took my clothes.

Q. Then you had not been living with him since May, 1932? A. No, sir.

Q. One more question. Were you dependent upon him for support at the time of his death? A. Yes, sir.

Q. Had he been contributing anything to your support since the time he left? A. No, sir.

Q. How had you been living, then? How had you been making your living? A. I was living with my sister and I went up there and bought some cows with my brother-in-law, on my note, as security, and was trying to make some money that way.

Q. You were working and making your own way at that time? A. I was trying to, yes.

The Deputy Commissioner: All right. Now you can develop what was the justifiable cause.

By Mr. Hagan:

Q. Where did you live before going to McLean, Mrs. Cartwright? You were living at McLean in February, 1932, when you said you first left him? A. Well, you know, we came back from Arizona in August.

Mr. Gower: I do not understand. If justifiable cause is being shown, I had a question in respect of that time away from Mr. Cartwright. The information in the bill is that there was a prior period to the one to which Mrs. Cartwright has testified. Now, will you bring that out at this time or later?

The Deputy Commissioner: You may bring it out on cross-examination.

Mr. Gower: That is all right; but I wanted your Honor to know that we claim there is a prior period of desertion.

92 The Deputy Commissioner: Before February, 1932?

Mr. Gower: Yes, sir. We claim there was desertion in October, 1931.

The Deputy Commissioner: You can bring that out on cross-examination.

By Mr. Hagan:

Q. You say you went to Arizona. When was that? A. 1930.

Q. And when did you return from Arizona? A. 1931.

The Deputy Commissioner: What time did she go to Arizona in 1930?

The Witness: September.

By Mr. Hagan:

Q. September? A. Yes.

By the Deputy Commissioner:

Q. And returned when? A. In September of '31.

Q. In September of 1931? A. Yes.

Q. And you were gone a year? A. Yes.

By Mr. Hagan:

93 Q. Mrs. Cartwright, where did you live previous to going to Arizona? A. Herndon.

Q. Where did you live when you came back from Arizona? A. McLean.

The Deputy Commissioner: Was she living with her husband at this time, when she came back?

Mr. Hagan: Yes, sir.

By the Deputy Commissioner:

Q. You mean you returned to your husband when you came back from Arizona in September, 1931? A. Yes, sir; I came back with him.

Q. And you lived with him until February, 1932? A. The girls and I went up to my brother-in-law and sister in October; and I got sick while I was up there and went to the hospital. Then my daughter was sick and I came back home and stayed with her until she got better and it was impossible for me to stay after that.

Mr. Hagan: I would like to call your Honor's attention, please, sir, to the fact that prior—that this answers Mr. Gower's question that between September—some time in September and some time—let's see——

The Deputy Commissioner (Interposing:) There was a year from September, 1930——

Mr. Hagan (Interposing:) That she was in Arizona.

The Deputy Commissioner: She returned when?

94 Mr. Hagan: She was in Arizona with her husband's consent, with their child.

Mr. Gower: Her child?

Mr. Hagan: With their child.

Mr. Gower: Until September, 1931. Then she lived with Mr. Cartwright one month and, in October, 1931, left with her daughters and, later, became ill and went to the hospital, and about that time was away from Mr. Cartwright.

The Deputy Commissioner: Is that correct?

The Witness: We went up to visit my sister for a short time. While I was there I was taken sick and went to the hospital.

By the Deputy Commissioner:

Q. How long did you stay in the hospital? A. A week.

Q. A week. A. And I went back home and my daughter was sick in bed in November.

Q. You stayed home from November until February, did you? A. Yes.

By Mr. Hagan:

Q. Will you explain to the Commissioner, please, Mrs. Cartwright, why you left in February? A. Well, my husband would not allow me any privileges at all at
95 home, when I came back. He was entirely changed from what he was before, and he would not allow me to cook. I asked him why he did it and he said if I did not like the way that he was doing that I could leave and stay away.

Q. You returned to your husband's home later, you said, in April? A. In April, when he called me.

Q. They called you to come back? A. Yes, sir.

Q. How did your husband treat you then? Did he attempt to make any reconciliation at that time? A. Never. None. He would not even speak to me the night I came

in to see my daughter. He never spoke a word to me the whole six weeks I was there.

Q. Then, some time in May, 1932, you went back to your brother's? A. Yes.

Q. What became of the girls? Where did they go? A. They stayed part of the time with him and part of the time with me; and when he filed the divorce papers, the 22nd of August, the girls had to come back to me.

Q. And thereafter you made a tender of reconciliation, did you? A. In September.

Q. Please state the circumstances of that.

96 The Deputy Commissioner: Do you mean in September, 1932, she made a tender of reconciliation?

Mr. Hagan: September, 1932; yes, sir.

By Mr. Hagan:

Q. State the circumstances, please. A. My daughter and her husband went to the Southern Railway, and she was very sick, and asked their father if Annie could come back. I could not take care of her. He said he had nobody to take care of her. I said I would come back and take care of her, if he would let us; and he said "Nothing doing," I could not come back.

Q. Subsequent to that time, Mrs. Cartwright, through your attorney, you filed an answer to Mrs. Cartwright's suit? A. Yes.

Q. And do you understand that in that answer you offered to go back to your husband? A. Yes.

Q. And live with him? A. Yes.

Q. When was that answer filed?

The Deputy Commissioner: May I ask if this came before the Court at any time?

Mr. Gower: What was the date of the answer that Mr. Hagan speaks of?

Mr. Hagan: I have not that record, sir; and I
97 doubt if she knows.

By Mr. Hagan:

Q. Mrs. Cartwright, do you know the date of the filing of your cross bill? A. No, sir.

Q. Can you approximate the time, Mrs. Cartwright? Do you remember with respect to Thanksgiving or Christmas or summer? A. Oh, no.

By Mr. Gower:

Q. Or do you remember with respect to Mr. Cartwright's death? A. It was—I know—isn't that the answer (indicating document)?

By Mr. Hagan:

Q. Do you know when it was filed? A. Mr. Oliver filed it in the Court, I think.

Q. No—but this particular answer to the divorce proceedings? A. I guess it would be in December; I do not know.

The Deputy Commissioner: Can it be admitted that this was filed? Isn't that a matter of record in the court? I do not see it here.

Mr. Gower: Yes. It ought to be a matter of record and I think it is. Of course it indicates—I have a means
98 of fixing it, but I do not know whether your Honor wants it.

The Deputy Commissioner: You have what? Mr. Gower: A means of fixing the date. That letter I offered, of Mr. McCandlish, was telling Mr. Cartwright about the filing of the answer, on the 12th day of January, and Mr. Cartwright died on the 13th. The effect of any offer of compromise, or offer to go back to Mr. Cartwright, in this cross bill—it reached Mr. Cartwright the morning of his death and he did not have much time to act on it. In our theory of it, it reached him about four minutes before his death.

The Deputy Commissioner: I wonder if we can not get a certificate from the Clerk of the Court, if that is an important thing.

Mr. Gower: Yes, if your Honor will indicate your desire for it.

The Deputy Commissioner: Is it of any importance, gentlemen? Of what importance is it?

Mr. Hagan: None to me, sir.

The Deputy Commissioner: Do you mean that the tender was not made to him in due time?

Mr. Gower: No, sir; the letter that I offered here indicates——

The Deputy Commissioner (Interposing): Just a minute now. What are you establishing as the cause of this
99 separation, Mr. Gower?

Mr. Gower: Desertion by—we are establishing nothing but what is in that bill.

The Deputy Commissioner: This bill of complaint?

Mr. Gower: We might have other testimony, but it involves Mrs. Cartwright, his aunt, and it would take us far afield. I do not think your Honor would find it useful. I must admit that we are confined to that bill for the useful purposes of this hearing.

The Deputy Commissioner: Can we stipulate that it was filed before his death?

Mr. Gower: The cross bill?

The Deputy Commissioner: Yes.

Mr. Gower: If we can also stipulate that he received a copy of it the morning of his death.

Mr. Hagan: You have produced the letter. Where is the copy of the cross bill?

Mr. Gower: The copy is in the hands of the Commissioner.

Mr. Hagan: Did not Mr. Baumgardner get that from the clerk of the Court in Fairfax?

Mr. Gower: I think that copy of the cross bill I got from Mr. Baumgardner—here.

The Deputy Commissioner: Just a moment, gentlemen.

Mr. Gower: I brought that letter from a particular source here and I traced it back to the pocket of
100 Mr. Cartwright. The letter indicates that with it was enclosed a copy of the cross bill and, therefore, I ask that this letter be admitted in evidence.

The Deputy Commissioner: All right. Then I shall ask also that a certified statement from the Clerk of the Court be furnished for the record, to show when this cross bill was filed. Are you in a position to secure that?

Mr. Hagan: Yes, sir.

The Deputy Commissioner: And mail it to Mr. Gower, to OK and send to me.

Mr. Gower: Let Mr. Hagan send it direct to you. I do not ask that he submit it to me.

(The letter from F. S. McCandlish to Mr. Cartwright was thereupon received in evidence and is filed in the office

of the Deputy Commissioner with the original papers in this case, marked as Respondent's Exhibit No. 4.)

Mr. Hagan: Do I understand that you are putting the answer in with this bill of complaint as being the answer taken from Mr. Cartwright's pocket?

Mr. Gower: I do not think it is of any importance. I see Mr. Baumgardner nodding his head there. What I say is this, that Mr. Cartwright learned on January 13, 1933, at a little after eight A. M., that his wife was going to fight this case, and there was a copy of the bill enclosed with that letter.

101 Mr. Hagan: I object to that letter, because you have not shown in evidence that that was the letter that he was reading.

Mr. Gower: No; but we have shown that that was the letter that was in his overcoat pocket; that the overcoat was taken to Mrs. Cartwright's home the day of his death, after his death.

The Deputy Commissioner: I will allow it to be introduced for what it is worth.

Mr. Gower: Yes, sir.

The Deputy Commissioner: You did not introduce this blue print as a part of the record.

Mr. Gower: I meant to offer it.

The Deputy Commissioner: It is received in evidence, as a plan of Room 620 of the Southern Railway Building.

Mr. Gower: Yes, sir.

(The blue print, heretofore marked as Respondent's Exhibit No. 1, was thereupon received in evidence and is filed in the office of the Deputy Commissioner with the original papers in this case.)

The Deputy Commissioner: What further evidence have you?

Mr. Hagan: None, sir.

The Deputy Commissioner: Is that your case?

Mr. Hagan: Yes, sir.

102-112 The Deputy Commissioner: How long do you want to file a brief? And you can mail a certified copy of the date of filing the cross bill to Mr. Gower.

Mr. Hagan: What is the general time for filing briefs?

The Deputy Commissioner: I have twenty days to pass upon the case.

Mr. Hagan: Ten days will be sufficient, sir.

The Deputy Commissioner: How much time do you want to make answer?

Mr. Gower: Two days. As far as any verification of any copy Mr. Hagan sends to your Honor, I do not want it.

The Deputy Commissioner: And you are resting your whole evidence upon this bill of complaint and the answer?

Mr. Gower: Yes, I think so.

The Deputy Commissioner: I mean with reference to the question of Mrs. Cartwright living apart for justifiable cause. It seems to be settled that she was living apart, and the only question is whether she was living apart for justifiable cause, or by reason of her desertion.

Mr. Gower: Yes, sir.

113 The said Bill in Chancery for Divorce and the said Cross Bill and the said letter of January 12, 1933, so referred to in the said transcript and marked as aforesaid were in the form of separate papers introduced and received into evidence and considered by the Court and are as follows:

114 Copy.

VIRGINIA:

In the Circuit Court of Fairfax County.

THOMAS JESSUP CARTWRIGHT, Complainant,

v.

MARY E. CARTWRIGHT, Defendant.

Bill in Chancery.

To the Honorable Water T. McCarthy, Judge of the Circuit Court of Fairfax County, Virginia:

Your complainant, Thomas Jessup Cartwright, begs leave to file this his bill against the defendant, Mary E. Cartwright, and thereupon says as follows:

1. That on the 24th day of March, 1902, your complainant was lawfully married at Rockville, Maryland, to the de-

fendant, whose maiden name was Mary Eliza Cissel, as will appear by the original certificate of marriage signed by Robert Lee McNair, clergyman, who performed the ceremony, which certificate is herewith filed, marked "Exhibit A," and prayed to be read as a part of this bill.

2. That continuously from the date of said marriage until the date of the desertion hereinafter set forth, your complainant and the said defendant lived together as husband and wife. At the time of their marriage, both your complainant and defendant resided in the State of Maryland, and they continued to reside in said state, with the exception of some two or three years spent in Arlington County, Virginia, until they moved to Virginia in 1919. In the fall of that year, complainant purchased a small farm containing some 40 acres of land with dwelling-house thereon, situated in the town of Herndon, Fairfax County, Virginia, which was their home until in the fall of 1931. They removed from the Herndon home to McLean in the County of Fairfax, where they lived together until the desertion hereinafter complained of. It will therefore be seen that for more than twelve years last past complainant has been domiciled in and an actual bona fide resident of the County of Fairfax. The defendant now resides on a farm owned by her brother-in-law, E. M. Forrest, near Navy, in the County of Fairfax, and she likewise has been domiciled in and an actual bona fide resident of the
115 County of Fairfax, Virginia, for more than twelve years last past. Both complainant and defendant are still domiciled in and actual bona fide residents of said county.

3. Four children were born of the marriage of complainant and defendant, namely, one boy, Thomas Edmund, who died of tuberculosis at the age of 25 years; two girls, Annie E. and Susan E., both of whom are over 21 years of age and reside with your complainant at the family home at McLean. The fourth child, Elizabeth W., died in September 1931, of tuberculosis at Tucson, Arizona.

4. For more than twelve years last past your complainant has been employed by the Southern Railway Company in Washington in the capacity of clerk, and has received a comparatively small salary. At the present time his salary is approximately \$130.00 per month, and in addition your complainant receives a pension of \$35.00 per month from the United States Government. When complainant pur-

chased the Herndon home, in 1919, the purchase price was \$6,000.00. He made a small cash payment and secured terms as to the residue. But for the generous assistance of his mother from time to time, which was very substantial, complainant would not have been able to defray the current living expenses of his family and keep up his payments on this property. As a matter of fact, it was still heavily encumbered when he removed therefrom in August, 1931. In the fall of 1930, complainant's said daughter, Elizabeth W. Cartwright, was ill of tuberculosis, and at the request of the defendant, in an effort to restore his daughter to health, complainant arranged for the defendant and his said daughter and two sisters to go to Tucson, Arizona, where she remained until she died in September, 1931. The expenses incident upon this stay in Arizona were very heavy and, along with other obligations incurred by complainant, involved him quite heavily in debt. He therefore found it necessary to dispose of the Herndon property, and in August, 1931, rented a very comfortable and convenient home at McLean, in the County of Fairfax, and when his daughter died he went to Tucson and brought his family to the McLean home. This was in September, 1931.

At first the defendant appeared to be satisfied with this home, but later expressed great dissatisfaction and
116 indicated she would not permanently reside there.

Complainant explained to the defendant that this was the very best home he was able to provide. Early in October, 1931, without justification or excuse, the defendant wilfully deserted and abandoned your complainant and her home and went to the home of her brother-in-law, Mr. E. M. Forrest, near Navy, in Fairfax County. At that time the complainant took with her her personal effects and both of the daughters of complainant and defendant. While she was away, defendant instituted proceedings in the Juvenile and Domestic Relations Court at Fairfax, Virginia, to require the complainant to furnish her support, etc. At that time she employed as her attorney Mr. John W. Rust and complainant engaged Mr. F. S. McCandlish, and the complainant and his attorney indicated very definitely to the court, to the defendant and her said attorney, that he desired his wife and children to return to his home at McLean, and that he would provide for them to the best of his ability, and he most urgently invited the defendant to re-

turn and endeavored to make a reconciliation, but the defendant remained obdurate, and while she did not press her case in court she returned to the home of her said brother-in-law at Navy and emphatically declined to become reconciled and return to complainant's home. Some time thereafter she became ill and was taken to a Washington hospital, and complainant, learning of her condition, went to see her at the hospital and arranged for her to return to his home, which she finally did early in November, 1931. She remained there until early in February, 1932, when she again, without justification or excuse, wilfully deserted and abandoned complainant and her home and went to the home of her said brother-in-law. During this stay at complainant's home the defendant ignored complainant in every way, failed and refused to have anything to do with him or to provide him any food, and he had to do his own cooking. During all of this time complainant provided and cared for the defendant to the best of his ability, and, although her conduct filled his life with sorrow and misery, he endeavored to do the very best he could for her. While defendant was at the home of her said brother-in-law on this occasion, one of the girls was taken sick and the defendant finally came back home to nurse this girl. She came back on, to wit, April 10, 1932, and remained until, to wit, 117 May 22, 1932, and while she was back in complainant's home on this occasion complainant undertook to discuss with her their matrimonial difficulties for the purpose of trying to straighten out the situation and arrange peace in the family so that they could all live together in peace and happiness. But the defendant emphatically declined to have any discussion or conversation with the complainant, and she said she wanted nothing whatever to do with him, and her attitude from that time on was such that she made it impossible for your complainant to even talk with her. The defendant actually declined to eat at the table with complainant and remained in his presence just as little as possible. On, to wit, May 22, 1932, the defendant again, without justification or excuse, so far as your complainant is concerned, deserted and abandoned your complainant and her home, taking with her her clothing and other personal effects. Since her last departure from complainant's home the defendant has never returned and her attitude toward

your complainant has been and is such that complainant feels assured she never intends to return. Complainant is advised and therefore charges that the defendant has now rented the farm of her said brother-in-law, Mr. E. M. Forrest, near Navy, and has gone into the dairy business there. The said two daughters of complainant reside with him at the family home at McLean. Neither of these daughters are employed or have any income, and complainant is providing for them to the extent of his ability and is doing everything in his power to give them a comfortable home.

Your complainant alleges that the defendant has wilfully deserted and abandoned him without justification or excuse and intends never to return. Complainant and defendant last cohabited in the County of Fairfax, Virginia, but there has been no resumption of the marital relation since she first left his home in October, 1931. Your complainant further alleges that he has sought in good faith a reconciliation with the defendant and that all of his efforts in that direction have been repulsed by her.

In view of the premises your complainant prays that he may be granted a divorce *a mensa et thoro* from the defendant on the ground of desertion, which at the proper time may be enlarged and merged into a decree *a vinculo matrimonii*; that each may be divested of all interest of every kind and description in the property and estate of the other, and that he may have such other, further and general relief as the nature of his case may require, or to equity shall seem meet;

And, to this end, complainant prays that the said Mary E. Cartwright may be made a party defendant to this bill and required, but not under oath, to answer the same, answer under oath being hereby waived; and that proper process may be issued. And, as in duty bound, complainant will ever pray, etc.

THOMAS JESSUP CARTWRIGHT.

BARBOUR, KEITH, McCANDLISH &
GARNETT,
Solicitors for Complainant.

A copy—Teste:
(Signed)

F. W. RICHARDSON,
Clerk.

119

Copy.

VIRGINIA:

In the Circuit Court of Fairfax County

THOMAS JESSUP CARTWRIGHT, Complainant,

v.

MARY E. CARTWRIGHT, Defendant.

Bill in Chancery.

To the Honorable Walter T. McCarthy, Judge of the Circuit Court of Fairfax County, Virginia:

The defendant, Mary E. Cartwright, files this her answer and bill of complaint in the above styled suit, to that certain bill of complaint filed by Thomas Jessup Cartwright, complainant, in the Circuit Court of Fairfax County, Virginia, and thereupon says as follows:

Answering the said bill of complaint, if further answer be required, defendant admits that *that* the time and place of her marriage to the said Thomas Jessup Cartwright is correctly set forth in said bill; that the name and age of their children is correctly stated and that they have resided in Fairfax County, Virginia, for more than one year next preceding the institution of this suit.

The other allegations contended in said bill of complaint, material to the issues involved in this cause, are denied in full or hereinafter explained.

Much as defendant hates to recite the sorted details of a wretched martial relationship, the memory of which is abhorrent, she feels that in order to protect and safeguard her rights and the interest of her invalid children the court should know the facts.

Without waiving the said answer, but insisting upon the same, Mary E. Cartwright, defendant, files this her cross bill of complaint against Thomas Jessup Cartwright, and states that complainant and defendant were lawfully married at Rockville, Maryland, on the 24th day of March, 1902, and that four children were born of said marriage, and that complainant and defendant have been an actual bona fide resident of Fairfax County, Virginia, and domi-

ciled therein, for more than one year next preceding
120 the institution of this suit; and,

That since February, 1932, complainant and defendant have not lived together as husband and wife; and

That the said Thomas Jessup Cartwright has willfully, and without any justification whatever, deserted and abandoned your complainant continuously since February, 1932; that is to say while they were living together as man and wife at McLean, Virginia, and at diver- times and places prior thereto he denied to your complainant any rights or privileges in the home and placed her in contempt before the children, and when she would plead with him to bring about a reconciliation of any possible differences that he would contend may be existing between them he would abruptly tell your complainant if she did not like it she should leave, and that while your complainant has bore these outrages for many years for the interest of their children until they became so unbearable that your complainant was forced and compelled to seek refuge elsewhere. That heretofore, to wit, during the year of 1919, you-complainant and their children purchased a home at Herndon, Virginia, the purchase price, \$6,000.00. That their son paid the first \$500 cash payment and the residue was paid from time to time by your complainant and the children with very little assistance from her husband. Later he conceived the idea that he would place a trust on the property for the purpose of making certain improvements thereon for the amount of \$6,000, and that his mother made him a Christmas present of this amount of the encumbrance on said property about four years ago. Since this time he encumbered the property to the extent of about \$3,500. Your complainant was compelled during the year of 1930 to take her daughter, Elizabeth W. Cartwright, who was ill of tuberculosis, to Tucson, Arizona, where they remained until September, 1931. That while your complainant was in Arizona he brought a deed to your complainant and requested that she sign it, stating that he was conveying their home at Herndon, Virginia, to his mother, but that it would continue to be their home and that his mother would reconvey whenever demanded. That your complainant owned and possessed a complete dairy business, consisting of equipment and sixteen head of cows, which he

disposed of while you- complainant was in Arizona.

121 That when your complainant returned from Arizona she learned for the first time that she was denied the right to return to her home in Herndon and that the dairy business which she had worked for and established out of her own funds was disposed of by him and the money derived therefrom appropriated to his own use. That he has not provided for your complainant for many years prior to their separation and is not at the present time providing for her and she is compelled to seek assistance from her friends and relatives; and,

That she has always behaved as a faithful and dutiful wife and took great delight in providing for the family and four invalid children which have suffered for many years from tuberculosis, and that your complainant is willing and ready and hereby offers to live as man and wife with her husband if he will treat her as his wife; that complainant is of the opinion that if he will live with her again, but free from the influence of his mother, a reconciliation can be effected, and that she feels that it is for the best interest of their children that they do live together.

That heretofore, to wit, during the month of September, 1932, your complainant made a bona fide offer to return and a request that he accept her back and provide for her and treat her as his wife, which he declined to do.

That your complainant is without any means whatsoever of support, or with which to prosecute this suit; that the said Thomas Jessup Cartwright has not given her any money at all since February, 1932, and long prior thereto, or furnished her with necessaries of any description, and that he has placed all of the property in his mother's name.

In consideration hereof and forasmuch as your complainant is remediless in the premises save in a court of equity, your complainant prays that the said Thomas Jessup Cartwright may be made a party defendant to this cross bill of complaint, and required, but not on oath, to answer the same, the oath being hereby waived; that proper process may issue on this cross bill; that a divorce *a mensa et thoro* may be decreed her on the ground of desertion, which at the proper time may be enlarged and merged into a decree *a vinculo matrimonii*; that the said defendant be required to furnish your complainant with sufficient money to prosecute this suit and to employ counsel therefor; that the said

defendant be required to pay your complainant temporary alimony pending this suit; that it be decreed that the said defendant shall pay to your complainant as permanent alimony such sum as the court may deem just so long as both your complainant and the said defendant shall live; and that your complainant in this cross bill of complaint may have such further, and other, and general, and complete relief in the premises as the nature of her case may require and to equity shall seem meet.

MARY E. CARTWRIGHT,

By Counsel.

HARRY A. SHOCKEY,

Counsel for Def.

A copy—Teste:

_____,
Clerk.

STATE OF VIRGINIA,

County of Fairfax, To wit:

I, F. W. Richardson, Clerk of the Circuit Court of Fairfax County, Virginia, the same being a Court of Probate and of Record, and having a seal, do hereby certify that the foregoing and hereunto annexed papers are true copies of the Bill of Complaint filed by complainant, and of the Cross-Bill of Complaint and Answer filed by the defendant, in the chancery cause lately pending in the said Court under the style of Thomas Jessup Cartwright, Complainant, vs. Mary E. Cartwright, Defendant, in which cause a final decree has now been entered, dismissing the same because of the death of the complainant, as said original Bill of Complainant and said original Cross-Bill of Complaint appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court hereto, at Fairfax, Virginia, this 19th day of July, 1933.

(Signed)

F. W. RICHARDSON,

[SEAL.]

Clerk.

STATE OF VIRGINIA,

County of Fairfax, To wit:

I, Walter T. McCarthy, Judge of the Circuit Court of Fairfax County, Virginia, the same being a Court of Pro-

bate and of Record, do hereby certify that F. W. Richardson, whose genuine signature appears signed to the foregoing and hereunto annexed certificate and thereon written, was at the date hereof, and is now, the Clerk of said Court, duly elected, qualified and authorized under the laws of said State to give the same, and that all his official acts as such Clerk are entitled to full faith and credit, and that the said certificate is in due form of law and by the proper officer. I further certify that I am well acquainted with the handwriting of the said F. W. Richardson, Clerk as aforesaid, and that his signature to the foregoing and hereunto annexed certificate is his usual and genuine signature.

Given under my hand this 19th day of July, 1933.

(Signed)

WALTER T. McCARTHY,

Judge.

123 STATE OF VIRGINIA,

County of Fairfax, To wit:

I, F. W. Richardson, Clerk of the Circuit Court of Fairfax County, Virginia, the same being a Court of Probate and of Record and having a seal, do hereby certify that the Honorable Walter J. McCarthy, whose genuine signature appears signed to the foregoing and hereunto annexed certificate and thereon written, was at the date thereof, and is now, the Judge of said Court and County, duly appointed and qualified and authorized under the laws of the State of Virginia to give the same, and that all his official acts as such Judge are entitled to full faith and credit.

I further certify that I am well acquainted with the handwriting of the said Walter T. McCarthy, Judge as aforesaid, and verily believe that the signature to the said certificate is his usual and genuine signature.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court hereto, at Fairfax, Virginia, this 19th day of July, 1933.

(Signed)

[SEAL.]

F. W. RICHARDSON,

Clerk.

124

Copy.

Barbour, Keith, McCandlish & Garnett, and R. Walton
Moore,

Attorneys and Counsellors at Law.

Fairfax, Virginia, January 12, 1933.

Mr. Thomas J. Cartwright,
Executive Office, Southern Railway Company,
Washington, D. C.

DEAR MR. CARTWRIGHT:

I have your letter of the 11th. Mr. Shockey has been employed by Mrs. Cartwright and has filed an answer and cross bill on her behalf, and I will have a copy of this paper made and enclosed with this letter. It looks as if we are in for a very considerable fight in this case.

You spoke to me some time ago about surrendering the house for which you are paying \$40 a month rent, as I understand, and in view of the fact that you now have the expense of keeping your daughter at the sanitorium I think you would be justified in giving up your house, if you can arrange to save any considerable sum in your living expense by so doing.

Very truly yours,

(Signed)

F. S. McCANDLISH.

125 Be it further remembered that the foregoing contains all of the evidence given on the hearing of this cause, and in order that the same may be preserved and made of record this Statement of Evidence is duly stated, approved and signed and ordered to be made of record in the above entitled cause this 10th day of July, A. D. 1934.

DANIEL W. O'DONOGHUE,

Justice.

The foregoing Statement of Evidence, it has been agreed by the counsel, is a true and accurate statement presented in the above entitled cause and is satisfactory to the undersigned counsel for plaintiff and the defendant, Southern Railway Company.

HAMILTON & HAMILTON,
By HENRY R. GOWER,

Atty. for Southern Railway Co.
HENRY STEARMAN,
Atty. for Mary E. Cartwright.

126 In the United States Court of Appeals for the
District of Columbia.

October Term, 1934.

No. 6304.

SOUTHERN RAILWAY COMPANY, a Corporation, and ROBERT
J. HOAGE, Deputy Commissioner for the District of Co-
lumbia, U. S. Employees Compensation Commission, Ap-
pellants,

vs.

MARY E. CARTWRIGHT, Appellee.

*Designation of Appellant, Southern Railway Company, for
Printing Record.*

Now comes the appellant, The Southern Railway Com-
pany, in the above-entitled cause by Hamilton and Hamil-
ton, its attorneys, and directs the Clerk to print the record
in said cause as filed, except the following parts thereof,
which the Clerk is directed to omit, namely:

Page eight of the volume of the Transcript of Testimony
before the Deputy Commissioner, beginning with line ten
thereof to and including line twelve on page sixty of the
said Transcript.

And on page 81 of the said volume of the Transcript of
Testimony, beginning with line twenty two to the end of
said Transcript.

(The parts of the said volume of the Transcript
127 of Testimony before the Deputy Commissioner which
are to be printed are the following pages: One to
seven, inclusive, thereof, and lines one to nine, inclusive,
of page eight thereof. And on page sixty of the said
volume of said Transcript of Testimony beginning with line
thirteen thereof to and including line twenty one (21) on
page eighty-one of the said volume of Transcript of Testi-
mony.)

Counsel certifies that the matter designated for omission
is immaterial to the determination of the questions in-

volved, and that the printing thereof would be a needless expense.

SOUTHERN RAILWAY COMPANY,
By HAMILTON & HAMILTON,
HENRY R. GOWER,

Attorneys for Appellants.

Copy received:

HENRY STEARMAN,
Atty. for Appellee.

128 [Endorsed:] 6304. Southern Railway Co., a corp.,
appellant, vs. Mary E. Cartwright. Designation of
appellant for printing record. United States Court of Ap-
peals for the District of Columbia. Filed Sep. 18, 1934.
Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court
No. 6304. Southern Railway Company, a corporation, ap-
pellant, vs. Mary E. Cartwright. United States Court of
Appeals for the District of Columbia. Filed Sep. 12, 1934.
Henry W. Hodges, clerk.

(5495-C)

FILED DEC 7 - 1934

IN THE

Henry W. Hodges

**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1934.

No. 6304

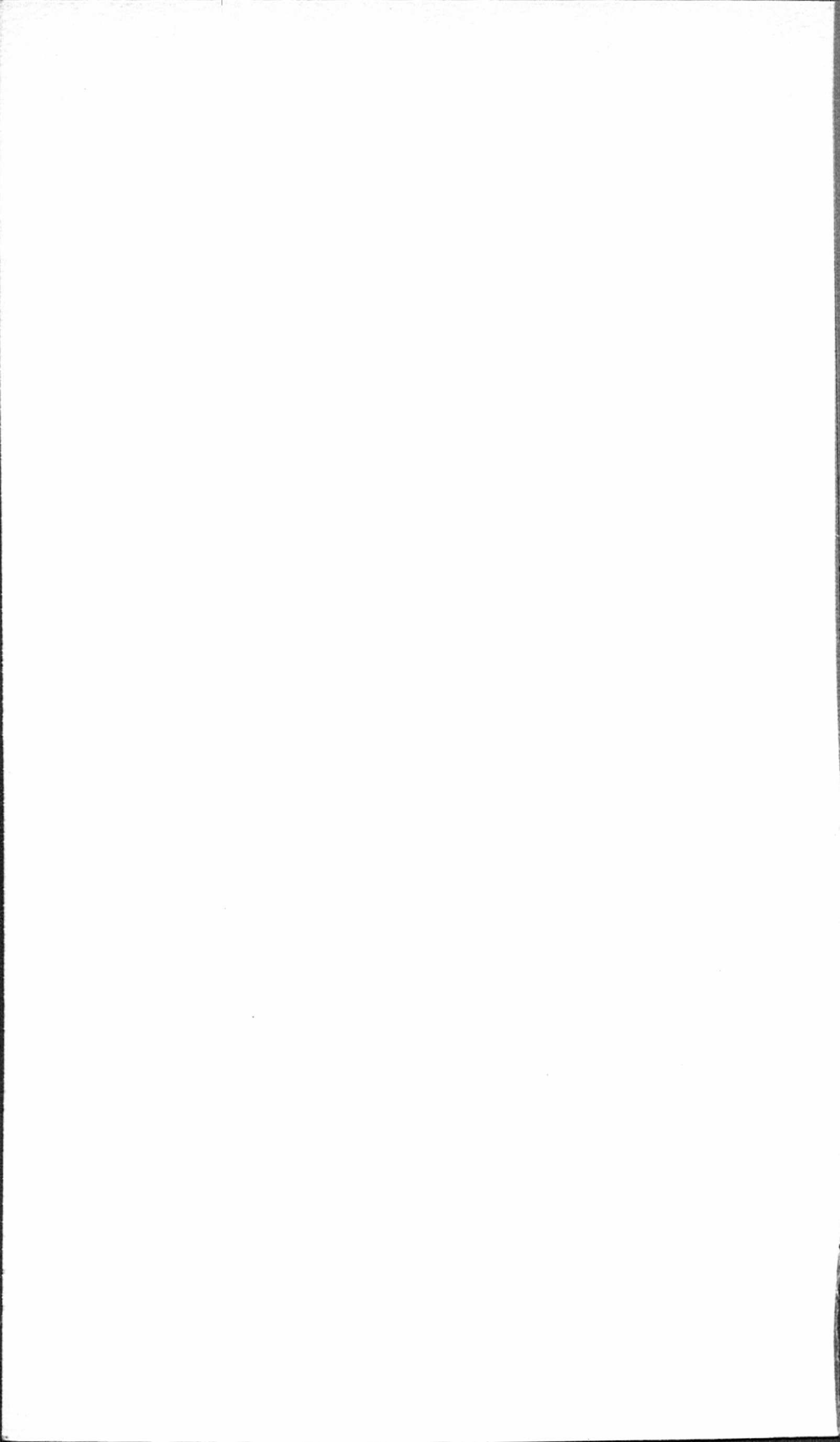
**SOUTHERN RAILWAY COMPANY, A CORPORATION,
APPELLANT,**

vs.

MARY E. CARTWRIGHT, APPELLEE.

**BRIEF OF APPELLANT, SOUTHERN RAILWAY
COMPANY.**

**GEORGE E. HAMILTON,
JOHN J. HAMILTON,
GEORGE E. HAMILTON, JR.,
HENRY R. GOWER,**
*Attorneys for Appellant,
Southern Railway Company.*



INDEX.

SUBJECT INDEX.

	Page
I. Statement	1
II. Assignment of errors	4
III. Argument	6
The lack of justifiable cause for claimant's living apart from her husband is a matter of fact on which the decision of the Deputy Commissioner is final, if there be any evidence reasonably to support it	6
The claimant's living apart from her husband began in claimant's desertion of her husband in October, 1931, because of her dissatisfaction with the home provided for her by her husband in McLean, Virginia	7
The fact of claimant's absence from her husband's house in October, 1931, is shown by the extracts which follow	9
Claimant's intention in quitting her husband's house in October, 1931	10
Claimant's reason for desertion in October, 1931	10
The record shows no legal justification for claimant's living apart from her husband	11

TABLE OF CASES CITED.

Albee's Case, 145 Atlantic 742	16
Bjorkstrand v. Klagstad, 262 Mich. 186	16
Crowell v. Benson, 285 U. S. 22	6
Diaz v. U. S., 223 U. S. 450	23
Dowling v. Jones, 67 Fed. (2d), 539	23
Employers Liability Co. v. Hoage, 62 W. L. R. 140	6
Newell v. Workmen's Compensation Bureau, 159 Atl. 316	23
Ogden v. Same, 17 App. D. C. 111	14
Powell v. Hoage, 61 App. D. C. 99	6
Spiller v. A., T. & S. F. Co., 253 U. S. 130	23
Taylor v. Taylor, 62 App. D. C. 316	15
Trice v. Trice, 55 App. D. C. 328	15, 17
Waltenberg v. Waltenberg, 54 App. D. C. 385	14
Wilson v. Locke, 50 Fed. (2d), 83	17

IN THE
**United States Court of Appeals for the
District of Columbia**
APRIL TERM, 1934.

No. 6304

SOUTHERN RAILWAY COMPANY, A CORPORATION,
APPELLANT,

vs.

MARY E. CARTWRIGHT, APPELLEE.

**BRIEF OF APPELLANT, SOUTHERN RAILWAY
COMPANY.**

I.

Statement.

This is an appeal by the defendant employer, Southern Railway Company, from a decree of the Supreme Court of the District of Columbia, in injunction proceedings, setting aside a compensation order in the form of a rejection of claim, under the District of Columbia Workmen's Compensation Act. The appellee claimant, Mary E. Cartwright, filed with the Compensation Commission, a claim for compensation in respect of the death of her husband, and a

hearing, at which claimant and employer were represented by counsel, was had before Honorable Robert J. Hoage, Deputy Commissioner, who issued a compensation order in the form of a rejection of the claim, on the ground that the claimant failed to establish by evidence that she was living apart from her deceased husband for justifiable cause. From the decree of the Supreme Court of the District of Columbia, setting aside this order, the appeal in this case has been taken. The appellee claimant, and her husband, Cartwright, lived at Herndon, Virginia, where claimant maintained a dairy business consisting of equipment and sixteen head of cows. In September, 1930, claimant took her sick daughter, Elizabeth, to Arizona, for her health and claimant remained there until the death of Elizabeth in September, 1931. While claimant was away, Cartwright, who was a clerical employee of the Southern Railway Company, appellant, found it necessary to discontinue the dairy business and to move to a house which he had rented in McLean, Virginia. When claimant returned from Arizona in September, 1931, she wanted to continue living at Herndon, and was unwilling to live at McLean. Early in October, 1931, claimant deserted her husband and went to the home of her brother-in-law, at Navy, Virginia. While so away from her husband, claimant instituted proceedings against her husband, Cartwright, in the Juvenile and Domestic Relations Court at Fairfax, Virginia, for support. While at her brother-in-law's home in Navy, claimant was sick and went to a hospital in Washington. Claimant's daughter, who was at the home of her father in McLean, became sick and in November, 1931, claimant went to Cartwright's house in McLean for the purpose of nursing her daughter and stayed with her there until the daughter became better in February, 1932, when claimant immediately left Cartwright's house in McLean. In April, 1932, one of her daughters, who was at Cartwright's house in McLean,

became ill, and claimant was called back in the night. In consequence, claimant went back to Cartwright's house in McLean, in April, 1932, and stayed six weeks "until Dr. Robey said it was all right for" her to leave her daughter (May 22, 1932), and then claimant again left Cartwright's house at McLean and went back to her brother-in-law's home.

The reason for claimant's desertion of her husband was her unwillingness to live with him in a rented house at McLean and her desire to return to Herndon and to be permitted to conduct her dairy business there. She subsequently did engage in conducting a dairy business at the home of her brother-in-law which she had rented.

Her daughters apparently lived with their father, at least between November, 1931, and August 22, 1932; and the return of claimant to her husband's house at McLean on two occasions was solely for the purpose of nursing a sick daughter, and in each instance, just as soon as her daughter got better, claimant immediately left her husband's house.

After claimant had left her husband's house on three different occasions, her husband filed in Fairfax County, Virginia, a suit for divorce on the ground of claimant's desertion; and claimant filed an answer and cross-bill. But Cartwright died before the case came to hearing.

The applicable provisions of the District of Columbia Workmen's Compensation Act are:

Sec. 9. If the injury causes death, the compensation shall be known as a death benefit, and shall be payable in the amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a surviving wife or dependent husband and no child of the deceased under the age of

eighteen years, to such wife or dependent husband 35 per centum of the average wages of the deceased during widowhood * * *."

Sec. 2. * * * (16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death, or living apart for justifiable cause or by reason of his desertion at such time."

No question of compensation to the daughters is involved, as they were over 18 years of age.

The only question in the case is whether there is any substantial evidence, or any evidence reasonably to support the findings of the Deputy Commissioner, which follow:

"That the claimant failed to establish by evidence that she was living apart from the employee for justifiable cause, or by reason of his desertion."

The last six words of the findings may be disregarded, for there is no evidence of the desertion of the claimant by her husband, the employee Cartwright. The only proof of desertion in the record is claimant's desertion of her husband.

This question of the presence in the record of any evidence reasonably to support the findings of the Deputy Commissioner is raised by the action of the Supreme Court of the District of Columbia, in decreeing that the Compensation Order be set aside as not in accordance with law.

II.

Assignment of Errors.

The Court erred:

1. In enjoining the defendant, Robert J. Hoage, Deputy Commissioner, from giving effect to the Compensation Order of June 9, 1933, in so far as said order is in form a rejection of claim.

2. In setting aside so much of the Compensation Order of June 9, 1933, as follows:

“It is found that the claimant, Mary E. Cartwright, was not living with employee, neither was she dependent upon him for support at the time of his death; that the claimant failed to establish by evidence that she was living apart for justifiable cause or by reason of his desertion.

“Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for compensation be, and it hereby is rejected for the following reason:

“That the claimant failed to establish by evidence that she was living apart from the employee for justifiable cause or by reason of his desertion.”

3. In holding in the decree signed herein on May 21, 1934, that the above-quoted portion of the Compensation Order of June 9, 1933, was not in accordance with law.

4. In directing in the decree of May 21, 1934, the Deputy Commissioner, Robert J. Hoage, to enter and file in the case before him a Compensation Order awarding compensation to the plaintiff, Mary E. Cartwright.

5. In stating in the decree of May 21, 1934, that plaintiff, Mary E. Cartwright, is the widow of Thomas Jessup Cartwright, deceased.

6. In passing and signing the decree herein of May 21, 1934.

7. In granting the relief prayed for in the Amended Bill of Complaint herein.

8. In other respects apparent of record.

III.

ARGUMENT.

The Lack of Justifiable Cause for Claimant's Living Apart from Her Husband is a Matter of Fact on Which the Decision of the Deputy Commissioner is Final, if There be Any Evidence Reasonably to Support It.

Court review is limited by the Act to a determination as to whether the Compensation Order is in accordance with law. If in accordance with law, the Commissioner's Findings are final. In *Crowell v. Benson*, 285 U. S. 22, at p. 47, the Court said:

"The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficiency of the plan *depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be accorded.*"

And in *Powell v. Hoage*, 61 App. D. C., 99, the Court said:

"We therefore reach the conclusion that the cases in which we may set aside an order of the Commissioner as 'not in accordance with law' are only those in which it appears that there is an error of law or in which the order of the Commissioner is not supported by substantial evidence, as well, of course, in those in which it is arbitrary and unreasonable. If the finding, however, is supported by substantial evidence, it is final."

In *Employers' Liability Company v. Hoage*, No. 5929, January 29, 1934, 62 W. L. R. 140 the Court said:

“Only in a case in which there is no evidence reasonably to support the findings, may we set aside the award made by the Deputy Commissioner.”

The Claimant's Living Apart from Her Husband Began in Claimant's Desertion of Her Husband in October, 1931, Because of Her Dissatisfaction with the Home Provided for Her by Her Husband in McLean, Virginia.

The *fact* of Claimant's desertion of her husband is definitely stated in Cartwright's Bill for Divorce as follows:

(R. 35): “Early in October, 1931, without justification or excuse, the defendant wilfully deserted and abandoned your complainant and her home and went to the home of her brother-in-law, Mr. E. M. Forrest, near Navy, in Fairfax County. At that time, the complainant (defendant) took with her her personal effects and both of the daughters of complainant and defendant. * * *”

And the *fact* of this desertion is not specifically denied in claimant's Answer and Cross-bill to Cartwright's Bill for Divorce. And the *fact* of Claimant's physical absence from her husband's house at this time is admitted by claimant in her testimony although she attempts to have it appear that she was away from her husband's house on a visit to her brother-in-law. Claimant used the opportunity offered by this “visit” to file proceedings for support against her husband in the Domestic and Juvenile Court in Fairfax. It is perfectly obvious that the purpose of her absence from her husband's house at this time was to facilitate the filing of this proceeding against her husband and claimant filed this proceeding for support because she had then determined to live no longer with her husband. Moreover, it would seem rather against probability that claimant, who had been in Arizona away from her husband for a full year, should, within a couple of weeks after her

return home, feel it necessary to go on a visit to her brother-in-law, and leave her husband's house.

Mrs. Cartwright apparently was not frank in her testimony regarding her desertion of her husband early in October, 1931. She spoke of it on the stand as a visit to her sister:

(R. 27) "By the Deputy Commissioner:

Q. You mean you returned to your husband when you came back from Arizona in September, 1931? A. Yes, sir; I came back with him.

Q. And you lived with him until February, 1932? A. The girls and I went up to my brother-in-law and sister in October; and I got sick while I was up there and went to the hospital. Then my daughter was sick and I came back home and stayed with her until she got better and it was impossible for me to stay after that".

Earlier in her testimony, the claimant-appellee had made the following statement:

(R. 25) "By the Deputy Commissioner:

* * * * *

Q. And when did you leave him? A. I left in February the first time. I went away in order to get——

Q. (Interposing) In February of what year? A. In '32.

Q. 1932, in February, you left him first? A. Yes."

So Mrs. Cartwright claimed that her first desertion was in February, 1932. She admits that she went on a visit to her brother-in-law and sister in October, 1931. And her intention in so doing is shown by the allegation in the Divorce Bill that while away from her husband she filed a proceeding in the Juvenile and Domestic Relations Court in Fairfax for support. If claimant's absence from her husband's house was in fact a "visit," if she intended to go back to

her husband, why should she file proceedings for support by him?

In respect, then, of the matter of claimant's living apart from her husband, the appellant now indicates to the Court substantial evidence of two matters: (1) that claimant began to live apart from her husband in October, 1931, and (2) that claimant *in her testimony* makes no attempt at justification of this desertion of October, 1931, and there is no justifiable cause for claimant's living apart from her husband shown in the record.

The Fact of Claimant's Physical Absence from Her Husband's House in October, 1931, Is Shown by the Extracts Which Follow.

(R. 28) "We went up to visit my sister for a short time,"

(R. 27) "The girls and I went up to my brother-in-law and sister in October."

Divorce Bill (R. 35, 36): "Early in October 1931, without justification or excuse, the defendant wilfully deserted and abandoned your complainant and her home and went to the house of her brother-in-law, Mr. E. M. Forrest, near Navy, in Fairfax County. At that time the complainant (defendant) took with her her personal effects, and both the daughters of complainant and defendant. While she was away, defendant instituted proceedings in the Juvenile and Domestic Relations Court, at Fairfax, Virginia, to require complainant to furnish her support, etc. At that time she employed as her attorney, Mr. John W. Rust, and complainant engaged Mr. F. S. McCandlish, and the complainant and his attorney indicated very definitely to the court, to the defendant and her said attorney, that he desired his wife and children to return to his home at McLean, and that he would provide for them to the best of his ability, and he most urgently invited

the defendant to return and endeavored to make a reconciliation, but the defendant remained obdurate and while she did not press her case in court, she returned to the home of her said brother-in-law, at Navy, and emphatically declined to become reconciled and return to complainant's home."

Claimant's Intention in Quitting Her Husband's House in October, 1931.

It is plain from the above extract from the Divorce Bill, that claimant had determined not to live longer with her husband, and she went to the house of her brother-in-law in order to give opportunity to file her proceedings in the Domestic Relations Court for separate support.

Claimant's Reason for Desertion in October, 1931.

Until September, 1930, claimant and her husband lived on a small farm of 40 acres near Herndon. The Divorce Bill states (R. 35):

"In the fall of 1930, complainant's said daughter, Elizabeth W. Cartwright, was ill of tuberculosis, and at the request of the defendant, in an effort to restore his daughter to health, complainant arranged for the defendant and his said daughter and two sisters to go to Tucson, Arizona, where she remained until she died in September 1931. The expenses incident upon this stay in Arizona were very heavy and, along with other obligations incurred by complainant, involved him quite heavily in debt. He therefore found it necessary to dispose of the Herndon property, and in August, 1931, rented a very comfortable and convenient home at McLean, in the County of Fairfax, and when his daughter died, he went to Tucson, and brought his family to the McLean home. This was in September, 1931. At first the defendant appeared to be satisfied with this home, but later expressed great dissatisfaction and indicated she would not permanently reside

there. Complainant explained to the defendant that this was the very best home he was able to provide. Early in October, 1931, without justification or excuse, the defendant wilfully deserted and abandoned your complainant. * * *."

The Claimant's Cross-Bill states in part.
(R. 39, 40):

"That your complainant owned and possessed a complete dairy business consisting of equipment and sixteen head of cows which he disposed of while you—complainant was in Arizona. That when your complainant returned from Arizona, she learned for the first time that she was denied the right to return to her home in Herndon, and that the dairy business, which she had worked for and established out of her own funds, was disposed of by him and the money derived therefrom appropriated to his own use."

The reason, then, for claimant's leaving her husband's house at McLean, appears from the above extracts to have been her dissatisfaction at the discontinuance of her dairy business and at the necessity of moving from Herndon to McLean.

The Record Shows No Legal Justification for Claimant's Living Apart from Her Husband.

In her testimony, claimant speaks of her absence from her husband's house in October, 1931, as a "visit"; she does not admit that this "visit" was a desertion; and necessarily then, and consistently, she refrains from any attempt at justification of her absence from her husband. In her testimony, her attempted justification of her absence from her husband is specifically referred to periods just prior to February, 1932 (R. 28), and May 22, 1932 (R. 28, 29), the two occasions on which she left her husband's

house after staying just long enough to nurse a daughter to a condition which permitted Claimant to again leave her husband's house.

The only matter in the record which might by any possibility be taken as an attempt by claimant to justify her desertion in October, 1931, is the following allegation in claimant's Cross-Bill; (R. 39):

“That the said Thomas Jessup Cartwright has wilfully and without any justification whatever, deserted and abandoned your complainant continuously since February, 1932; that is to say while they were living together as man and wife at McLean, Virginia, and at divers times and places prior thereto, he denied to your complainant any rights or privileges in the home and placed her in contempt before the children and when she would plead with him to bring about a reconciliation of any *possible differences that he would contend may be existing between them*, he would abruptly tell your complainant if she did not like it she should leave and that while your complainant has bore these outranges for many years for the interest of their children until they became so unbearable that your complainant was forced and compelled to seek refuge elsewhere.”

But this matter is plainly not stated nor intended to be stated as justification for living apart from her husband. It is in terms stated to show a desertion of claimant by Cartwright:” * * * *deserted and abandoned your complainant continuously since February, 1932; that is to say, while they were living together as man and wife at McLean, Virginia, and at divers time and places prior thereto, he denied to your complainant any rights or privileges, etc., etc.*” There is, of course, no foundation whatever for any claim that Cartwright abandoned and deserted claimant.

But if, contrary to the plain intent of this allegation, it be considered as justification for claimant's living apart,

its application to claimant's desertion of October, 1931, is expressly negatived by claimant's own testimony. The claimant on the stand in the hearing before the Deputy Commissioner had no complaint to make of her husband's conduct towards her prior to November, 1931, and this is shown by the following extract from the record:

(R. 28) "Well, my husband would not allow me any privileges at all at home, *when I came back*. *He was entirely changed from what he was before.* * * *"

"*When I came back*" can only mean November, 1931. "*Changed from what he was before*" can only mean prior to November, 1931. This, then, is a statement by claimant that her husband's attitude towards her was satisfactory before November, 1931, and unsatisfactory to her when she came back to nurse her daughter in November, 1931. And if claimant deserted her husband in October, 1931, as alleged in the Divorce Bill, she did so, on her own statement, without cause or justification.

In this case, the Court has no duty to weigh testimony, or to find the preponderance of evidence; the Court has no function in this record beyond the determination of whether there is *any evidence to support the findings of the Deputy Commissioner*. The matter just set out above is adequate evidence of a desertion by claimant in October, 1931, without justification of any kind shown therefor, accompanied by conduct (namely, the filing of proceedings by claimant against her husband for separate support) which assured the permanence of the condition.

We find no matter in the record which can be in any sense considered as justification for claimant's desertion of her husband other than the allegations in her cross-bill just reviewed (R. 39) and the following statements in her testimony:

(R. 27) "Then my daughter got sick and I came back home and stayed with her until she got better and it was impossible for me to stay after that."

(R. 28) "Well, my husband would not allow me any privileges at all, when I came back. He was entirely changed from what he was before, and he would not allow me to cook. I asked him why he did it and he said if I did not like the way he was doing that I could leave and stay away."

(R. 28-29) "How did your husband treat you then? Did he attempt to make any reconciliation at that time? A. Never. None. He would not even speak to me the night I came in to see my daughter. He never spoke a word to me the whole six weeks I was there."

Even if we waive all matter showing contradiction of these extracts, or in explanation of them, and take the extracts at their full strength, they still fall far short of furnishing justification for claimant's living apart from her husband. The causes for a legal separation in the District of Columbia are stated in the 1929 Code, Title 14, Section 63, as drunkenness, cruelty and desertion. There is in this record no question of drunkenness by Cartwright, nor of his desertion of claimant. Cruelty has been considered by this Court in this connection in the following cases:

Ogden v. Same, 17 App. D. C., at p. 111:

"By the great weight of authority, which we deem it unnecessary here to review, cruelty, as a ground of divorce, is not limited to physical violence. Conduct actually causing mental suffering of severity to seriously affect health and endanger life is such cruelty also."

Waltenberg v. Waltenberg, 54 App. D. C., at p. 385:

"To bring the case within the statute, it is sufficient if the evidence, in the absence of physical violence, established conduct which creates a state of mind which

operating upon the physical system produces bodily injury.”

In *Trice v. Trice*, 55 App. D. C., 328, the Court found that the testimony fell far short of establishing cruelty within the rule in the Waltenberg case, and said:

“We have also ruled that where there is a conflict in the testimony and the trial court has had opportunity to observe the demeanor of the witnesses, and therefore in a better position to determine their credibility, a finding by that court will be disturbed here only when palpably wrong.” Citing *McClaren v. McClaren*, 45 App. D. C., 238; *Cole v. Cole*, 52 App. D. C., 302.

In *Taylor v. Taylor*, 62 App. D. C., 316, the proof was quite as strong for a separation as in this Cartwright case, but the Court said:

“In the absence of physical violence, to bring the case within section 63, title 14, D. C. Code, 1929, (Section 966, D. C. Code, 1901,) which authorizes a divorce *a mensa et thoro* for cruelty, the evidence must establish conduct creating a state of mind which, operating on the physical system, produces bodily injury. Mere lack of congeniality, or incompatibility of temper and the consequent wranglings of the parties, will not justify a charge of cruelty on the part of either. * * *

The Code and decisions of the State of Virginia are to the same effect.

No allegation of claimant's Cross-Bill, nor any statement in testimony even suggests that any word or act of her husband caused mental suffering which affected claimant's health, or affected her physical system so as to produce bodily injury. Claimant's proof would have been entirely insufficient to support her bill for a separation in the courts of the District of Columbia or in the State of Virginia.

And under the authorities, the phrase "justifiable cause" in the Compensation Act is construed to mean such cause as would be a foundation for a legal separation, that is, drunkenness, desertion or cruelty of the character described in the decisions of this court just cited.

This construction is upheld by the two compensation cases which follow:

In *Bjorkstrand v. Klagstad*, 262 Mich. 186, the Court said:

"Under section 8422, questions of dependency, total or partial, are determined by the Department of Labor and Industry in accordance with the facts at the time of the injury. Subsection (2) of section 8422 provides that a wife shall conclusively be presumed to be wholly dependent upon a deceased husband with whom she lives at the time of his death, or from whom, at the time of his death, the Department of Labor and Industry shall find that she was living apart for justifiable cause, or because he had deserted her. It has been repeatedly held that the words 'justifiable cause' as employed in the statute have the meaning given them in separation or divorce cases."

In *Albee's case*, 145 Atlantic 742 (Maine, 1929), the court said:

"Justifiable cause which will excuse a wife for living apart from her husband ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such character as might entitle her to a divorce from the bonds of matrimony, but such, for instance, as could be made, without turning on the same length of time, the foundation for a judicial separation. See R. S. C 66, section 10."

Therefore, the finding of the Deputy Commissioner that the claimant failed to establish by evidence that she was living apart from her husband, for justifiable cause, becomes absolute, because of the absence in this record of grounds for a legal separation by claimant-appellee, which, by the decisions under the Compensation Act, are the required "justifiable cause" for living apart.

The *Trice* case, 55 App. D. C. 328, just cited above, is interesting here in its statement of the rule that a finding by the trial court, which had better opportunity to observe demeanor and determine credibility, would not be disturbed in this Court unless palpably wrong. In this record, the Deputy Commissioner occupies the place of the trial court in the rule of the *Trice* case. The Deputy Commissioner saw and examined the witness. (The credibility of witnesses is for the Deputy Commissioner. *Wilson v. Locke*, 50 Fed. 2nd, at page 83.)

Cartwright was a clerical worker, a clerk in the Southern Railway. Claimant ran a dairy business of sixteen cows. The Commissioner in his observation of claimant on the stand may well have considered that she was not at all a fragile, submissive sort of person; and when she spoke of the denial of privileges, the Commissioner may have concluded that she was not the type of person to wait for the allowance of privileges, but the type of person to take what she wanted without thought of permission.

Applying the rule of the *Trice* case, by analogy, the finding of the Deputy Commissioner in this case is beyond recall. And it is quite as free from question under the rule of review directly applicable to this record, for there have been set out in this brief extracts from the record which are substantial evidence that claimant failed to establish by evidence that she was living apart from her husband for justifiable cause. And this condition of claimant's living apart from her husband, which began in claimant's deser-

tion of her husband in October, 1931, without justifiable cause, as shown by claimant's own testimony, continued until the death of her husband. There were two periods during which claimant returned to her husband's house, and, in addition, there was an effort made in the court below to show that two attempts at a reconciliation with her husband were made by claimant.

But these matters make no interruption to the fulfillment of claimant's plain determination to live apart from her husband. On the occasions of claimant's return to her husband's house, she did so, as she herself testifies, to nurse her sick daughter, and when sufficient improvement was found in her daughter's condition to warrant claimant in leaving, she promptly left her husband's house.

(R. 27) "The girls and I went up to my brother-in-law and sister in October; and I got sick while I was up there and went to the hospital. Then my daughter was sick and I came back home and stayed with her until she got better and it was impossible for me to stay after that."

This shows Mrs. Cartwright at home solely for the purpose of staying with her sick daughter. She did not return to Mr. Cartwright. He is not even mentioned.

Then in April, 1932, Mrs. Cartwright returned to her husband's house. The record shows this:

(R. 25, 26) "Well, I was called back. My daughter was sick and they called me in the night, about eleven o'clock and I went back. * * * In April. * * * I stayed there six weeks, until Dr. Robey said it was all right for me to leave my daughter.

"Q. And then you left again when? A. I left in May, about the last of May" (1932).

Mrs. Cartwright went back only when her daughter was sick; apparently she would not have gone back at all except

for her daughter's illnesses, because in each case she only stayed until she could safely leave her daughter, and then went away again. Nor are the attempts to show efforts by claimant to bring about a reconciliation with her husband any more effective. She states in her cross-bill (R. 40):

"That heretofore, to wit, during the month of September, 1932, your complainant made a *bona fide* offer to return and a request that he accept her back and provide for her and treat her as his wife, which he declined to do."

But the above statement cannot be taken literally. For, it is apparent from claimant's testimony that, before filing her cross-bill, she made no offer of reconciliation other than the alleged one of September, 1932. And the record shows that this alleged offer of September, 1932, was identical with and none other than the alleged offer of reconciliation described in her testimony shown below. Consequently, the claim made in the cross-bill is superseded by and reduced to the following:

(R. 29) "Q. And thereafter you made a tender of reconciliation, did you? A. In September.

"Q. Please state the circumstances of that.

"The Deputy Commissioner: Do you mean in September, 1932, she made a tender of reconciliation?

"Mr. Hagen: September, 1932; yes, sir.

"By Mr. Hagen: State the circumstances, please.

"A. My daughter and her husband went to the Southern Railway, and she was very sick, and asked their father if Annie could come back. I could not take care of her. He said he had nobody to take care of her. I said I would come back and take care of her, if he would let us; and he said 'nothing doing,' I could not come back."

In the first place, this is hearsay. Claimant was not present. Claimant did not write to her husband, offering to return

to him; she did not even send her daughter to act for her. The daughter went to see Cartwright in her own interest and on her own account and apparently from the daughter's subsequent report to claimant she understood that Cartwright did not want his married daughter to return to his house and be nursed there by claimant. From claimant's account of the interview between Cartwright and his daughter, it does not appear that any suggestion was made that claimant should go back to live with her husband at his house. "I said I would come back and take care of her" (R. 29) apparently means that claimant told her daughter to tell Cartwright that claimant would come back to take care of her daughter at the husband's house, if he would permit it. No regret was expressed by claimant for having left her husband, no representations were made as to what might be expected in the future. In fact, no offer was made to Cartwright in any form, except to relieve him of the care of his sick daughter, if the daughter went to her father's house. Twice before when claimant returned, she stayed only long enough to nurse her daughter into a condition in which she could leave her, and then claimant left. With no more said than appears from claimant's testimony, was Cartwright not justified in believing that claimant, if she returned, would leave as soon as her daughter improved? So far as the record indicates, claimant's thought and concern were for her daughter, and no offer of reconciliation with her husband can be made out of language in which the husband is not even mentioned.

Nor is the alleged second offer of reconciliation any more effective. The reason why counsel for claimant withdrew his objection to the admission of the Divorce and Cross bills, was that he hoped to use the Cross Bill in any attempt to show a second offer of reconciliation made by claimant to her husband, in the Cross Bill. But the record shows that Cartwright did not learn of the contents of the Cross Bill

until the day of his death, which was January 13, 1933 (R. 21, 22). From the pocket of the coat which he wore when he died there was taken a letter from his attorney, F. S. McCandlish, dated January 12, 1933, informing Mr. Cartwright that Mrs. Cartwright had filed a Cross Bill to Cartwright's Divorce Bill and Mr. McCandlish wrote that he would have made and enclosed in the letter a copy of the Cross Bill. This letter was addressed to Mr. Cartwright at the Southern Railway, Washington, D. C. (R. 43). The letter was dated January 12, 1933; Cartwright was fatally injured and died on January 13, 1933. No opportunity is shown for action by Cartwright on an offer contained in the Cross Bill.

It was urged in the court below that the Divorce Bill filed by the employee, Cartwright, against his wife, the appellee, claimant, and the Cross Bill filed thereto by the claimant were not "legal" evidence in this record. The appellant insists that the Divorce Bill and Cross Bill are properly in the record on the authority of statute and that under decisions of the Supreme Court of the United States this evidence should be considered and accorded its natural probative effect.

The Divorce and Cross bills are properly before this Court for the following reasons:

1. Because by section 23 (a) of the Compensation Act, the Deputy Commissioner is not bound by common law or statutory rules of evidence and acting under such authority the Deputy Commissioner expressly admitted these bills into evidence and incorporated them into the record. (R. 24.)

In the Act, Sec. 23 (a), it is provided that the Deputy Commissioner "shall not be bound by common law or statutory rules of evidence" * * * "but may make such investigation or inquiry or conduct such hearing in

such manner as to best ascertain the rights of the parties.”

2. Because counsel for claimant withdrew his objection to the admission of the Divorce and Cross Bills, acquiesced in the consideration of them by the Deputy Commissioner, and made use of the Cross Bill in his presentation of claimant's case to the Deputy Commissioner.

The Divorce Bill and Cross Bill were admitted in evidence by the Deputy Commissioner at page 24 of the record, and the objection by claimant's then counsel to the admission of the Divorce Bill and Cross Bill was withdrawn on page 24 of the record. (The withdrawal by counsel for Mrs. Cartwright of his objection to the admission of the Divorce and Cross Bill was made because counsel planned to use the Cross Bill for a purpose connected with Mrs. Cartwright's case, namely, to show a second offer of reconciliation.) On page 29, Mrs. Cartwright's counsel questioned her regarding her offer of reconciliation contained in the Cross Bill, and on page 31 of the record, the following position with respect to the Cross Bill was taken by Mrs. Cartwright's counsel:

“Q. The Deputy Commissioner: All right. Then I shall ask also that a certified statement from the clerk of the court be furnished for the record, to show when this Cross Bill was filed. Are you in a position to secure that?

“Mr. Hagan: Yes, sir.”

3. Because the withdrawal of objection by counsel for Mrs. Cartwright, to the consideration by the Deputy Commissioner of the Divorce and Cross Bills, constituted a judicial admission by such counsel of the filing of the Divorce and Cross Bills in the Virginia court, and of the fact that the allegations shown in the copies in evidence before the Deputy Commissioner had been made in the original papers filed in the Virginia court.

4. Because the position is upheld by decisions of which several are shown below:

In *Newell v. Workmen's Compensation Bureau*, New Jersey 1932, 159 Atlantic 316, the court said:

"Prosecutor contends that the testimony of Peter Leone and Lavinia Kiple was incompetent. Certainly much, if not all, of the testimony was incompetent. But there was no objection to its admission, and hence there was no error in its admission."

In *Diaz v. U. S.*, 223 U. S., at page 450, the court said:

"So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible."

In *Spiller v. A., T. & S. F. Co.*, 253 U. S., at page 130, the court said:

"The evidence was not objected to as hearsay when introduced, nor, indeed, at any time during the hearing before the Commission. Counsel did in some instances assert that there was a failure of proof and suggest that the proceeding ought to be dismissed. But the objections came too late and were too general in character to be equivalent to an objection to the reception of the evidence because hearsay. Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered and accorded its natural probative effect, as if it were in law admissible."

In *Dowling v. Jones*, 67 Fed. 2nd, at page 539, the court said in part:

"Although the letter is an unsworn declaration of Mas, it was admitted without objection, or limitation, and even if it was incompetent, once before the court it was evidence like any other probative fact. *Schlemmer v. Buffalo Co.*, 205 U. S. 1, 9; *Diaz v. U. S.*, 223

U. S. 442; *Rowland v. Boyle*, 244 U. S. 106, 108; *Spiller v. Atchison Co.*, 253 U. S. 117. We do not mean to suggest that it was not competent; as a corroborative declaration *ante litem motam*, of a witness, the veracity of whose story upon the stand is challenged, it may well have been admissible anyway; but with that we are not concerned. * * *

Briefly restated, the Deputy Commissioner, who saw and examined the witness, found that the claimant was not entitled to compensation because she was not living apart from her husband for justifiable cause. The decisions hold that "justifiable cause" in the Compensation Act means cause sufficient for a legal separation or limited divorce. Cruelty is the only possible ground here, and the Code and decisions under the Code, as applicable to this record, require that cruelty sufficient to support a divorce from bed and board must be such as to cause mental suffering of severity to seriously affect health and endanger life; a state of mind which operating upon the physical system produces bodily injury. Claimant's proof here not only makes no showing of effect on or injury to her health, but the subject is not mentioned or even suggested in the record.

On this state of the record, we respectfully submit that the decree of the lower court setting aside the Compensation Order should be reversed and that the Compensation Order should be again made effective.

GEORGE E. HAMILTON,

JOHN J. HAMILTON,

GEORGE E. HAMILTON, JR.,

HENRY R. GOWER,

Attorneys for Appellant,

Southern Railway Company.

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